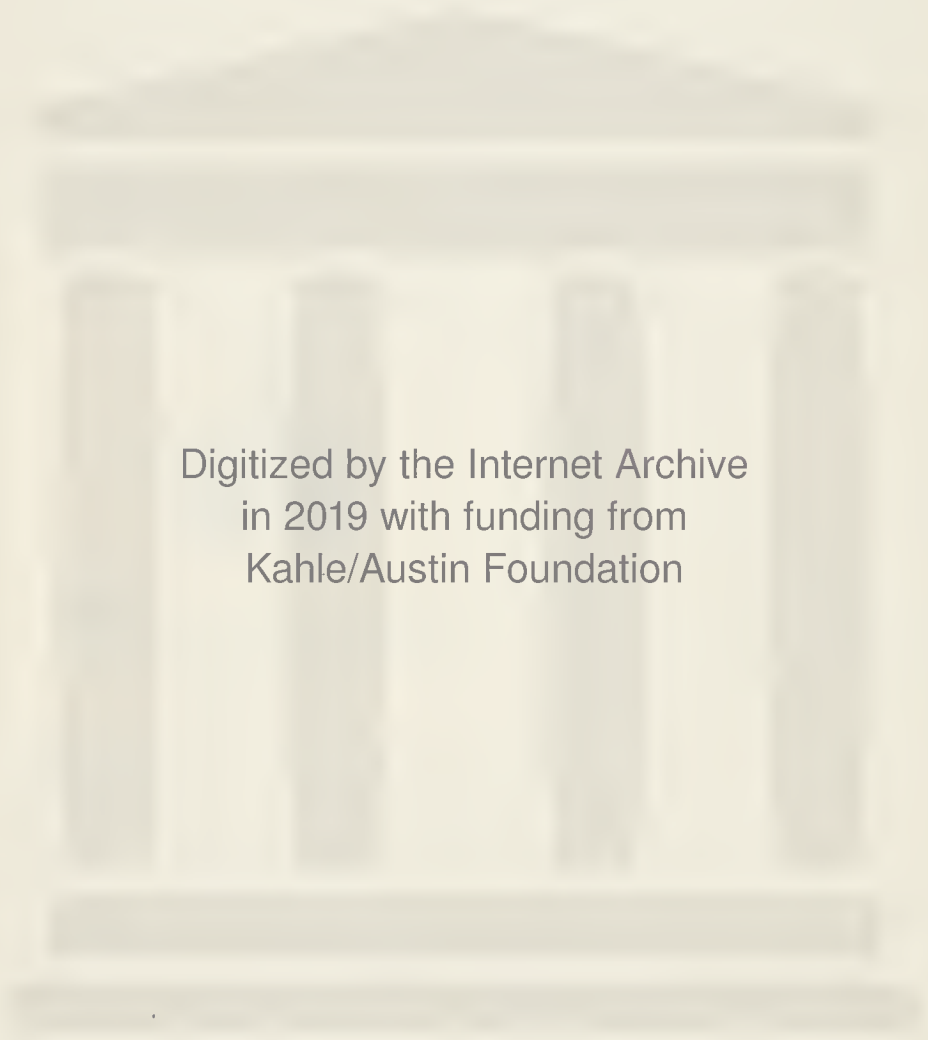

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

Oxford University Press, Amen House, London E.C.4

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
BOMBAY CALCUTTA MADRAS KARACHI LAHORE DACCA
CAPE TOWN SALISBURY NAIROBI IBADAN ACCRA
KUALA LUMPUR HONG KONG

First edition 1936
Reprinted 1962

The Royal Institute of International Affairs is an unofficial and non-political body, founded in 1920 to encourage and facilitate the scientific study of international questions. The Institute, as such, is precluded by the terms of its Royal Charter from expressing an opinion on any aspect of international affairs. Any opinions expressed in this publication are not, therefore, those of the Institute.

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1936

SEVENTEENTH YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO

Editorial Communications should be addressed to:

The Secretary,
The British Year Book of International Law,
The Royal Institute of International Affairs,
Chatham House,
10 St. James's Square, S.W. 1.

SET IN GREAT BRITAIN AT THE
UNIVERSITY PRESS, OXFORD, AND
REPRINTED BY OFFSET LITHOGRAPHY BY
GREGG ASSOCIATES, BRUSSELS, BELGIUM

CONTENTS

CONTENTS

THE PROTECTION OF VESTED RIGHTS IN INTERNATIONAL LAW

By G. KAECKENBEECK, D.C.L., President of the Arbitral Tribunal for Upper Silesia

Object of the article

1. THE doctrine of vested rights has, especially since the Great War, played an important part in international controversies. It has, in one famous case at least, arising out of the Rumanian agrarian legislation, arrayed almost all world-known jurists in two irreconcilable camps; it has been the object of much discussed dicta of the Permanent Court of International Justice. Learned societies have formed select special committees to deal with it. But agreement is not in sight, either as regards its acceptance into international law or as regards its extent or implications. Since much of the literature on the subject is fragmentary and controversial, it often proves more of a drawback than a help to students. My wish, in this article, is not, therefore, to add a one-sided opinion to so many others. I shall aim at explanation rather than at argument. I propose to examine the whole matter, without prejudice, intent on scientific consistency, but bearing in mind the fundamentally practical character of the question, which, after all, is born of an attempt at securing a satisfactory measure of justice in the administration of law.

We are therefore going to look first into the foundations and import of the doctrine in general legal theory and in municipal law, and then inquire into the state of positive international law. In this inquiry we shall be concerned with law as it is, not with law as it ought to be. We shall take the international society as we find it, however different some of us might wish it to be, and however more perfect the organization of international justice might then be made.

What is meant by "vested rights"?

And first of all, we must ask, what is meant by "vested rights, droits acquis, wohlerworbene Rechte, jura quaesita"? The notion has a long history. Suffice it for our purpose to note that it once was contradistinguished from inborn rights. Later it was explained to be a right resting on a special title of acquisition, as contrasted with statutory rights attributed to all or to a definite

class of persons by a legal rule. The emphasis was laid on "quaesitum", "acquis", "erworben", "vested". It was sought to distinguish between such rights as, deriving only from a statutory provision, could also be taken away by statutory provision, and such rights as, resting on a special title of acquisition, could not be thus taken away.

In France the stress was laid rather on the completion of the acquisition, and vested rights were contrasted with legal expectations or even expectancies. Rights were considered as "acquis" when they had definitely become our own. In course of time, however, many jurists became loath to distinguish between titles of acquisition, and reflected that expectations and expectancies were not rights properly speaking. They thought that where a right had not vested in a subject, there was no subjective right at all. This recognition culminated in the phrase of Regelsberger: "ein jedes Recht ist ein erworbenes" (every right is a vested right), and in the remark of Duguit: "Jamais personne n'a su ce que c'était qu'un droit non acquis" (nobody ever knew what was a non-vested right). In this sense there is no difference whatever between "vested rights" and "existing rights"; and a theory of protection of vested rights would cover all existing rights. But the words "vested", or "acquired", "acquis", "erworben", "quaesitum", cannot be dispensed with, whenever the time or place of acquisition, i.e. of the coming into concrete existence, of the right is to be determined or alluded to.

However variously defined, the notion of vested rights has in legal theory and in municipal law been consistently resorted to for solving the ever-recurring difficulties which arise out of the collision of laws in respect of time. In this connexion the principle of respect of vested rights appears, so to say, as the other side of the principle of non-retroactivity of laws.

Non-retroactivity and vested rights

2. We must be clear about the working and scope of this principle, were it only to avoid drawing unauthorized conclusions from it. Let me recall them in the form of a condensed outline, based on two of the leading authorities: the famous Romanist, Karl v. Savigny, in the eighth book of his *System des heutigen römischen Rechts*, and the no less famous Germanist, Otto Gierke, in his *Deutsches Privatrecht*.

A *collision of laws* in respect of time takes place when two successive rules of law contend for authority over the same legal

relation. The principle applicable in private law to such a case is reducible to two formulas, which represent but two aspects of the same thing: (1) no retroactive effect is to be attributed to new laws, and (2) new laws leave vested rights unaffected.

There is *retroaction* where a law draws under its dominion the consequences of past juridical facts, and influences these consequences. Such retroaction may vary in degree. Example: A has stipulated payment in gold in a contract with B two years before payment in gold is abolished. Non-retroaction would maintain the vested right of A to be paid in gold even in the future. A first degree of retroaction would prevent payment in gold in the future, but leave A the right to claim payment in gold for any sums due on the contract before the coming into force of the new law. A higher degree of retroaction would overrule A's right to demand payment in gold for the past as well as the future. Corresponding therefore with the notion of retroaction is the notion that legal relations should be preserved in their original nature and efficacy.

By *vested right*, however, is not as a rule here meant every legal relation of a determinate person. Abstract faculties or qualities of all men or of whole classes of men, as well as expectations founded on the law, are not vested rights, and are normally destroyed by a new law. Examples: the liberty to embark upon industrial or commercial activity, the expectation of A to be heir to B according to existing law. Gierke for his part insists on the special title of acquisition.

The *purport* of the principle differs according as it has reference to the lawgiver or to the judge. *The lawgiver should not* enact retroactive laws. This is not, however, a rule of positive law, but a principle of legislation. It is without sanction. A law is valid and binding although retroactive, and individuals suffering damage through such a law would have no legal claim against the state. For the *judge*, however, the principle constitutes an obligatory rule of interpretation. The judge has so to interpret and apply new laws, even if their terms are indistinct as to this point, that no retroactive force be ascribed to them, no vested rights disturbed.

What is the inner force and justification of this principle? Is not a new law always enacted in the persuasion that it is better than the one it supersedes? The principle is based on the necessity of an immovable confidence in the authority of laws; confidence not so much in their permanence as in the continued efficacy in the future of juridical acts performed for the acquisition of rights according to prevailing laws. The opposite principle would be

impracticable and mean a perpetual revolution in the state of rights and property.

However, this principle has its *limitations and exceptions*, conditioned not only by the notion of vested rights itself, but by the nature of the laws conflicting with them. Thus, with regard to interpretative laws, or with regard to laws abolishing or changing legal institutions as such, which are closely connected with moral, political, and economic motives and purposes, the preservation of vested rights cannot be conceived as a ruling principle, because it would rob these laws of all meaning. Think for instance of the abolition of slavery, of the transformation of irredeemable tithes into redeemable ones. It is true that Gierke does not here, like Savigny, see a proper case of retroaction but simply the statutory suppression of vested rights, the continuation of which had become inconsistent with the prevailing legal consciousness. When the suppressed rights are of economic value, equity requires compensation to be given. Equity, not law, for the legislator can refuse all compensation, either expressly or implicitly, as frequently happens in revolutionary periods, and legal consciousness will reconcile itself with it the sooner if convinced that the suppressed rights are but antiquated survivals, void of present justification.

The principle of non-retroactivity existed in Roman law. As it was present also in Germanic legal consciousness and was adopted by Canon law, it obtained, through these channels, validity in all Europe. Yet Savigny is entirely right when he points out that the whole question should be withdrawn from the province of absolute right and transferred to that of legislative policy, which is its true place. Many ruinous errors may there be avoided by caution, prudence, and moderation. At the same time, he says, one cannot admit for any single epoch the power of throwing a spell and exercising a domination over every future age by its own sense of right.

Just one example illustrating the application of this theory in modern municipal law: the *Code Napoléon* provides in its Art. 2 that a law only enacts with regard to the future, and has no retrospective effect.

What criterion of retrospective operation did French judges resort to in applying this provision? They had not the least hesitation in admitting that if a law disturbed or violated vested rights it would operate retrospectively, but that in so far as it only affected what fell short of being vested rights, for instance expectations or expectancies, its operation would not run counter to Art. 2. This is

undoubtedly French law, notwithstanding many critical observations of modern French authors about the impossibility of giving a satisfactory definition of vested rights.

As to the applicability of this Art. 2: it prohibits French judges from making a law operate retrospectively. It does this in the sphere of French private or civil law. It does not apply to public law. It does not prohibit the legislator from enacting retroactive statutes. If, therefore, the legislator does enact a retroactive statute the judge is bound to apply it as it is. The rule of Art. 2 is thus only a rule of interpretation for the case when the legislator has not clearly taken position himself. A judgment violating the rule of Art. 2 would be liable to be quashed by the Cour de Cassation.

We have, I think, sufficiently characterized the classical theory of vested rights, in its connexion with the principle of non-retroactivity. Its object is, as we have seen, to afford a solution of collisions of laws in time, by effecting, as Pillet describes it, the progressive elimination of the action of the old law by restricting it in the first place to rights vested before the change of legislation. As these rights gradually disappear, the new law obtains exclusive control. Whether this theory constitutes the only, or the best possible, method for attaining that object, need not be discussed here.

Recognition and enforcement of rights vested abroad

3. Neither Savigny, nor Gierke, nor indeed any of the other leading authorities, have resorted to the notion of vested rights for solving collisions of laws in space. But several modern authors on the conflict of laws, and among them some of the best, postulate a principle of recognition and enforcement of rights duly acquired under the law of any civilized country. I may quote, to refer only to the best known, the first general principle in Dicey's great work on the conflict of laws: it reads: "Any right which has been duly acquired under the law of any civilized country is recognized, and in general, enforced by English courts, and no right which has not been duly acquired is enforced, or in general recognized by English courts."

General principle No. II, it is true, states exceptions to the rule of enforcement of vested rights, as in the case of inconsistency with statutes of the Imperial Parliament, inconsistency with the policy of English law, with the moral rules upheld by English law or with the maintenance of English political institutions, and finally of interference with the authority of a foreign sovereign.

To make the relation of these exceptions with the first principle

more precise, Dicey begs his readers to bear in mind that exceptions are exceptional—a truism which, he says, is constantly overlooked. The essential matter here, he adds, is to keep the mind firmly fixed on the general recognition of vested rights.

I think I may fairly presume Dicey's doctrine to be known to my readers. But it may not be amiss to point out that other systems which concentrate on the problem of the extra-territorial operation of laws, leave little or no room for a theory of the extra-territorial effect of vested rights, yet lead to no very different results in practice. Dicey, however, takes the view that English judges—or any judges—never in strictness enforce the law of any country but their own. Upon the occasions on which they are popularly said to enforce a foreign law, what they do in reality is to enforce not a foreign law, but a right acquired under the law of a foreign country.

I hardly need insist on the essential differences of nature and scope between Dicey's principle of private international law and the municipal law doctrine of non-retroactivity, differences which condition the very notion of vested rights applicable to one or to the other of them. Vested rights in the non-retroactivity theory must of necessity be exclusive of expectations and all legal relations falling short of the standard of being vested which entitles them to a certain immunity from retroaction. The duly acquired rights of Dicey, on the other hand, include all legal positions that would be enforceable by the law under which they were created—subject always, of course, to the exceptions enumerated in his Principle II. The object of this notion is not indeed to select rights specially entitled to preservation, but to give validity outside the territorial limits to all rights duly created. In this way it is the necessary postulate of any system of private international law based on territoriality and which in principle refuses to apply foreign laws.

As any system of law necessarily provides for the creation of rights and for the protection of the rights thus created, so also must private international law provide rules for the creation of internationally valid rights and, if this is to have any sense, for their international recognition and enforcement.

If one admits that the rules of the conflict of laws are only municipal law, the recognition and enforcement of rights acquired abroad is a question of expediency in view of international commerce, yet would remain entirely subordinate, not only in detail but as a whole, to municipal legislation.

If one admits that the rules of the conflict of laws are really international law, the principle of enforcement in one country of rights duly acquired in another would assume a binding international character. In his remarkable book entitled *Principes de Droit International Privé*, Pillet has shown it to be but a corollary of the mutual respect of sovereign states, on which modern international law and organization rest.

Let us listen one moment to his argument.

"The interest of a state, under whose authority rights have been acquired, in having them respected abroad is obvious. The very recognition of its own sovereignty, which has given these rights their force, is at stake, as well as the participation of its nationals in international commerce, which otherwise would be impossible.

"Equally obvious is the absence of any interest of foreign states in denying such rights their effects. Their sovereignty does not go so far as to govern acts totally foreign to their territories and nationals. The application of foreign laws in such a case does not in any way detract from the authority of their own laws. Moreover to refuse effect to such rights would make commerce impossible with other states; and no state can have an interest in this.

"Thus in principle the rule in question is as certain in theory as necessary in practice; it even reveals a correspondence in the interests of various states instead of a conflict. Each state has therefore as a general rule to ensure on its territory the recognition and respect of rights vested abroad. This may be considered as one of the foundations of private international law."[1]

This statement of Pillet calls for a few remarks:

(*a*) The duty in question is a general duty "as a general rule to ensure the respect of rights vested abroad", a general duty without which private international law would lack one of its foundations. This in no way amounts to the assertion that each private right duly vested in one country is, as such, taken cognizance of and protected by public international law, so as to make the infringement of it in another country an international tort.

(*b*) Pillet's notion of vested rights, like Dicey's of duly acquired rights, includes in principle all legal positions enforceable under the law under which they arose, and therefore is not the same as the traditional notion resorted to in connexion with non-retroactivity. We must therefore keep these two notions distinct, as also the two principles they are connected with.

(*c*) The principle of recognition is worked out only for private rights to the exclusion of public rights or rights having a political origin, and is besides subject to the great general exception of "ordre public" which fairly corresponds to Principle II in Dicey's system.

[1] § 284, p. 515. Translation by the author of this article.

Application in international law of the two principles of non-retroactivity and of recognition and enforcement of private rights vested abroad.

4. It is interesting that Savigny expressly gives as a ease of application of his theory of retroactivity the case of a change of legislation due to cession of territory, and that Pillet also sees in the case of cession of territory a typical case for the application of his theory of the international effect of vested rights.

They each of them, however, refer to different aspects of the same question. Pillet thinks of the change of sovereignty and explains why rights created under the former sovereignty will be recognized and enforced by courts under the new sovereignty.

Savigny sees in the cession the cause of a change in legislation, which is indispensable for the application of his doctrine. In interpreting the new laws judges will have to conform to his principle of non-retroactivity.

In both these ways it may be claimed that the case of a change of sovereignty over a territory raises issues calling for, or at least admitting of, the application of the principles of respect for vested rights dealt with above; and in this sense it may fairly be said that these principles are recognized by international law.

How, with what limits, and with what consequences, it is now time to inquire.

A change of sovereignty leaves private rights unaffected

5. I. A *change of sovereignty* over a territory may have various causes which, however, make no difference for our purpose. Whether it is due to conquest or cession, the sovereignty of the annexing state *displaces* that of the ceding state in the territory in question. This, as a rule, means that the political organization, the public law and the public policy of the new state supersede those of the former one; but all private law relations of individuals are left unaffected. In view of the principle of the international effect of vested rights which we have just discussed, this is easy to explain and to legitimate, yet the origin of the rule probably lies elsewhere. As the notion of sovereignty became clearly dissociated from patrimonial implications, it became evident that by ceding a territory the sovereign did not and could not cede the property and other rights of his subjects. A cession of territory therefore does not imply any change in the private rights of the inhabitants nor does it legitimate the confiscation of any of those rights. In a

famous case, *U.S.* v. *Percheman*[1], Chief Justice Marshall stated the law relative to this in a passage which has become classic. The plaintiff had acquired some 2,000 acres of land in Florida by grant from a Spanish Governor. After the cession of Florida by Spain to the United States in 1819 his right was disputed. The plaintiff appealed to the U.S. Courts. In deciding in his favour, Chief Justice Marshall said:

"It may not be unworthy of remark that it is very unusual even in cases of conquest for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an Act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign . . .

"A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belongs to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."[2]

In the practice of the courts the result is completed and corrected by the operation of the rules of the conflict of laws according to which the courts of the cessionary state will give effect to private rights duly acquired before the cession in conformity with the law then in force in the ceded territory, with only such reservations as are dealt with in Professor Dicey's Principle II, or are implied in the notion of "ordre public".

We have here to do with an actual and universally accepted rule of positive law. The rights it maintains are in principle all the private rights in existence at the moment of the cession and then enforceable at law, not exclusively such vested rights as the classical non-retroactivity theory will protect.

It is this rule which the Permanent Court of International Justice applied in its advisory opinion no. 6 on the German settlers in Poland. A number of colonists domiciled in territory ceded by

[1] *U.S. Supreme Court*, 7 Peters 51. [2] *Loc. cit.*

Germany to Poland were occupying holdings under contracts concluded with the German colonization commission. Regarding itself as the owner of these holdings under Art. 256 of the Treaty of Versailles, the Polish Government considered itself entitled to cancel such contracts. I am leaving out all facts not necessary for our purpose, at the risk of not doing justice to the arguments of the parties.

The Court rejected this contention of Poland. It first of all made clear that under such contracts the settlers had vested rights enforceable as against the vendor. The principal question which confronted the Court was therefore whether, the sovereignty and the ownership of state property having changed, the settler who had concluded a "Rentengutsvertrag" with the Prussian State was entitled to claim from the Polish Government, as the new owner, the execution of the contract? The Court rejected the view that the contractual rights had automatically fallen to the ground in consequence of the cession of territory. Private rights acquired under existing law, the Court laid down, do not cease on a change of sovereignty. The law had not been changed. The question whether and under what circumstances a state may modify or cancel private rights by its sovereign legislative power thus required no consideration.

"Even those who contest the existence in international law of a general principle of state succession", the Court went on to say, "do not go so far as to maintain that private rights including those acquired from the state as the owner of the property are invalid as against a successor in sovereignty."[1]

Substitution of one State for the other in legal relations

The legal relations in question were, as the Court found, private law relations, but they existed between private individuals and the state. This explains the reference to state succession. It also indicates the direction in which the chief international difficulties arise. Something more than what is meant by the principle of private international law, discussed above, is here at work. There is a substitution of one state for the other as one of the parties to the legal relation, and the principle of public international law that vested rights are unaffected by a change of sovereignty must here cover such a substitution. This is what also happens in the case of concessions granted to individuals or companies by the ceding state. It was long thought doubtful whether international law

[1] *Publications of the P.C.I.J.*, Series B, no. 6, p. 36.

required the succeeding state to respect them. Such doubts were all the more explicable because the principle of respect for vested rights was here complicated, not only by a change in the person of the state, but also by the fact that concessions are not pure institutions of private law, but present a mixture of private and public legal characters.

According as the private or the public character is thought to prevail, the application or rejection of the rule of respect for private rights appears justified. There is no doubt that the weight of opinion is at present in favour of the obligation to respect concessions, but in view of the considerable public importance which some concessions may have, it would be undue optimism to believe that the debate on this question is for ever closed.

It should not, for instance, be overlooked that the United States of America seems to have consistently subordinated the maintenance of concessions to the proof of a benefit for the territory ceded. This benefit theory has not become an international criterion. In *England*, owing to the peculiar doctrine of Acts of State, matters connected with the annexation of territory are not justiciable by municipal courts. One must, therefore, look to the practice of the British Government, the most authoritative utterance of which remains the Report of the Transvaal Concessions Commission. In reading it, one should bear in mind the narrow meaning given by the Commissioners to the word "legal", due, as Westlake remarks, partly to attachment to Austin's narrow definition of law and partly to connecting the term with ordinary courts of law, which in England are not the only channels of redress where the Crown is concerned.

As there are many rights or legal relations of mixed private and public character, Max Huber, in his well-known work on state succession, has attempted to formulate the rule applicable to them as follows: "Rights which are a mixture of private and public rights perish so far as they are public in case the successor state does not possess a corresponding institution. If it possesses rules which apply to the case, they will in future govern."[1] As examples Huber quotes fiefs, knightly property ("Rittergut"), guilds with compulsory powers, compulsion to grind at a certain mill, monopolies of sales, rights of patronage, schools, saleable appointments, mintage and postal rights enjoyed by private persons, exemptions from military service, &c.

[1] *Staatensuccession*, §§ 94, 95. Translation quoted from Westlake, *International Law*, Part I, Ch. iv, p. 82, edit. 1904.

This is probably as equitable a formulation as is possible in one rule, although it hardly mitigates the many real difficulties which are encountered in practice, and which are a proper subject for judicial elucidation. But, in my opinion, the *gist* of the matter is rather that the operation of the principle of respect for vested rights is not checked by a change in the person of the state as long as the private law character of the relation prevails, but it *is* checked when the public character of the legal relation prevails.

It would not be sound, however, to try to decide in which legal relations of mixed character the successor state is, in a given case, internationally bound to substitute itself for its predecessor, exclusively by reference to this principle. A great many political and financial considerations here come into play. Think of questions like invalids' pensions, or rights to an annuity from social insurance funds. Would not the question of state-substitution be dependent on the solution given to the question of the distribution of state debts and state funds? One may therefore well say that the will of the states concerned, whether it is expressed in a convention or is to be deduced from acts and presumed from facts, will as a rule be decisive. This is why treaties of cession should, and mostly do, contain special provisions in this respect.

Where the legal relation has an *exclusively public* character, there is no duty, apart from special conventions, for the successor state to substitute itself for the ceding state. Thus, for instance, in the legal relations of government officials. If then a cessionary state takes over government officials of the ceding state, new legal relations are thereby created, which are exclusively governed by the law of the cessionary state.

These questions, difficult in themselves, are often perplexed by the differences which exist between municipal systems of law or even by dogmatic divergencies. The great development, for example, given in the last few decades, especially in Germany, to the notion of "öffentliche subjektive Rechte", public subjective rights considered valid against the state, and which naturally have a tendency to be brought under the notion of vested rights, raises many delicate points concerning the true limits of the principle of respect for vested rights in cases of cession.

Nor is this all. Other difficulties may also arise when, for instance, a conventional meaning is attributed to vested rights or when treaties or laws organize a special protection of vested rights and stamp as vested rights for the purpose of that protection legal positions which would not otherwise fall within that notion. Such

cases constitute special law, and depend entirely on the interpretation of the provisions they rest on. Nor are they as special law susceptible of an extensive interpretation. This is what occurs when the German-Polish Convention of May 15, 1922, introduces into its system of protection of vested rights in Upper Silesia a number of legal positions which are really only qualifications under public law.

Application of the principle of non-retroactivity

6. When, as a consequence of the cession, the cessionary state introduces new legislation in the ceded territory, there is not only occasion for applying the principle that private rights are left unaffected by the cession, but also the principle of non-retroactivity. In so far as this principle binds the judges as a rule of interpretation of the new laws, its application depends only on municipal law, and a failure to apply it rightly would as a rule, bring with it no other sanctions than such as the municipal law provides, unless of course an international disregard of it against a foreigner could be construed as a kind of denial of justice.

But a systematic and wholesale disregard of the principle would be regarded as inconsistent with the law of nations, as when, in territory annexed by it, Chile once presumed to have titles acquired under its predecessor tested by applying to them its own municipal law instead of the municipal law of its predecessor under which they had vested. The United States lodged a strong protest. Nor would it make much difference whether such a systematic and wholesale disregard of the principle was technically based on a statute or not, as a state cannot elude international obligations, or render internationally illegal acts internationally legal by enacting a statute to that effect.

No immunity of vested rights against legislation

But the more general question arises whether the rule that private rights are unaffected by a change of sovereignty obtains only so long as the new state does not legislate, or whether, and then how far, new legislation has to make a halt before legal situations and rights acquired by individuals before the cession.

First of all let us note that there is no visible reason for admitting that rights acquired under the sovereignty of the legislating state should be more precarious than rights acquired under the sovereignty of a predecessor. We can therefore safely argue from

the point of view of a state legislating apart from any question of cession of territory.

In considering the principle of non-retroactivity, we have seen that, as it addresses itself to the lawgiver it does not constitute a binding legal rule. Formally therefore, i.e. in point of competence, it does not limit the legislative power of the state, which remains complete and unrestricted so long as a conventional or customary rule of positive international law does not limit it.

Of bilateral conventions limiting legislative power there are some examples. The most far-reaching is probably the German-Polish Convention of May 15, 1922, relative to Upper Silesia, which stipulates certain limitations to legislation for a period of fifteen years, combined with a system of compensation for the suppression or diminution of certain vested rights. This, however, constitutes exceptional law. It is neither declaratory nor even illustrative of general international law. For no general customary rule limiting the legislative power of states to legislation not interfering with vested rights or—what comes to the same thing—making internationally illegal, legislation infringing vested rights and therefore rendering a state internationally liable for it, has ever been shown to exist. Nor has it ever been accepted in a multilateral law-making document.

When, a few years ago, the League of Nations entrusted a preparatory committee with drawing up bases of discussion for a conference on the codification of international law, it addressed, among others, the following question to all governments: "Does the state become responsible through enactment of legislation infringing vested rights of foreigners?" The answers of the governments have been published as well as observations thereon by the preparatory committee. "The replies on this question", this committee writes, "reveal fairly substantial differences of opinion. Doubts are felt as to what precisely is to be understood by vested rights. Some replies admit that the state is responsible. Others say that the rights in question, having been acquired under the law of the state, are liable to be terminated by that law. Some consider a general answer impossible. In these circumstances it has not been felt desirable to make the question the subject of a separate basis of discussion."[1] Surely this is sufficient confirmation that no generally accepted rule of international law is here in existence.

We are therefore undoubtedly justified in laying down that enactment of legislation infringing vested rights of foreigners does

[1] *League of Nations document.* C 75 (a) M 69 (a) 1929 V, Vol. III, p. 37.

not *per se* involve the international liability of a state. This all the more, because the contrary conclusion would conflict with the principle, for the general acceptance of which there is good evidence, that apart from special conventions foreigners cannot claim a better legislative treatment than nationals.

The rule laid down does not, however, prejudge the question what else may involve the liability of the state. Nor does it answer the question what is sound or unsound, responsible or irresponsible legislation.

Perhaps some distinctions may be useful as a precaution against possible misunderstandings. When a right rests on a treaty stipulation, its infringement by legislation or otherwise involves the international liability of the infringing state, as a breach of treaty. When a foreigner's right rests on a contract with the state or on a concession, its infringement through legislative action is often held to render the state internationally liable, but this would seem to be certain only when the concession has been granted or the contract has been entered into by the state as such, that is as Sovereign, and not simply as Fisc, that is to say, in its capacity of subject of municipal private law.

But apart from international obligations accepted by the state as such under a treaty or otherwise, the question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the state alone is competent to decide. And we must not forget that almost every social change, almost all so-called progress, plays havoc with some vested rights.

The Question of Compensation

Another question, then, is whether the sacrifice imposed on the holders of the rights overruled is so considerable and exceptional as in justice to require alleviation in the form of an indemnity. Many see one single issue in these two questions and speak in one breath of a duty not to suppress vested rights without compensation. I believe this to be erroneous or at least misleading. Expediency from the point of view of public interest, and the equitableness of granting an indemnity are in my opinion two absolutely distinct questions, the solution of which depends on different facts and considerations. If a state grants an indemnity to the holder of a suppressed vested right, I submit that it does not pay it as compensation for a tort, in order to redeem an illegal act, but simply as an equitable alleviation, from funds of the community, of the

economic sacrifice demanded on behalf of the community. It follows that not every suppression of vested rights needs compensation. It follows also that failure to grant compensation might in some cases cause a gross and unjust hardship even though the suppression of the right be, from the point of view of state policy, perfectly legitimate and justified. What is therefore needed to ensure a minimum of justice in international practice is not an alleged principle of immunity of vested rights against legislation—which has no place in international law—but, in my opinion, an international minimum standard for equitable compensation. Individual confiscation of property without indemnity undoubtedly falls short of the international standard of civilized society, because it violates the sense of equity of the civilized world, on which its deepest legal convictions rest, which is at the root of all legislation on expropriation and which has been ratified by a long international custom, as *inter alia* many arbitral decisions show. On the other hand it is clear that what in most civilized systems of municipal law is not deemed to require compensation, such as the exercise by the state of its police or taxation power whatever sacrifice it may impose on individuals, requires no compensation according to the international standard.

Undoubtedly the ascertainable international standard is as yet rudimentary. It needs above all judicial elaboration.

But to make this elaboration fruitful it is in my opinion essential to keep clearly in mind that the ground of compensation here is not reparation of a wrong but alleviation of an exceptional hardship, and that the aforementioned standard exists only as a requirement or, so to say, as a reservation of elementary justice. This standard, valid only between states, is not meant as a model of normality but as a minimum of justice and fairness in the treatment of foreigners, which a state may not transgress without exposing itself to rightful intervention and international liability. No state need admit, nor should admit, that its nationals abroad be deprived of rights and property in a way which shocks the sense of justice of civilized men. No state need accept from another hostile discrimination against its subjects. On the other hand, in receiving aliens into its territory a state does not become their insurer against losses accruing to them on account of changes of policy or legislation, however radical these may be. For settling conflicting claims between states in this connexion, judges and arbitrators are the proper agency to resort to. And, apart from special agreements, they will have no other means of settling the differences

than through recourse to the aforesaid international standard. Only, and this is worth insisting on, the application of this standard must always take into account all the elements of the case, for the very reason that it is a standard of justice and fairness. It can never be stereotyped, nor can it be subjected to hard and fast rules.

Conclusions

7. We come, therefore, to the conclusion that the principle that a cession of territory does not affect private rights is valid only as long as new legislation is not introduced which affects them; that the introduction of such legislation is not prohibited by international law, and is not in particular made by it dependent on payment of compensation; that the principle of non-retroactivity applies to the interpretation of the new laws only as a matter of municipal law, but that a systematic violation of this principle would be resented as conduct falling short of the international standard of civilized society; that the question whether and to what extent a state will grant compensation for legislative suppression or infringement of rights is properly a matter for state legislation or judicial application, but that refusal by a state to grant compensation where elementary justice requires it, even though it could not be impugned by its nationals, may, if applied to foreigners, be taken up by the state to which they owe allegiance, and may eventually fail to pass muster before an international tribunal.

Some readers may think that the measure of international protection of vested rights described above shows a deficient condition of international law, especially as the protection of its nationals abroad is for every state a matter of free appreciation, in which, failing a judicial standard of reasonable stability and certainty, motives of political expediency are apt to overrule the demands of equity. This is why an international judicature accessible to private individuals is often demanded. In some cases international courts with limited jurisdiction have indeed been set up and made accessible to individual claimants against a state. This is the case with the mixed arbitral courts set up by the peace treaties. It is also the case with the German-Polish Arbitral Court for Upper Silesia, set up after the partition of the territory in 1922 and due to function until 1937. It has a varied jurisdiction in which the protection of vested rights on a conventional basis plays an important part. Of especial interest is the fact that its protection of rights vested before the partition is extended to nationals as well

as foreigners, and concerns legislative suppression as well as administrative infringement. It is, however, far from effectively protecting every conceivable right, for the rights for the suppression or diminution of which an indemnity is to be paid are expressly determined in the Convention, though in a rather ambiguous way.

Such special jurisdictions have their special utility. They are born of exceptional circumstances, and elaborate special conventional law. They constitute highly interesting experiments, and as such deserve close attention. But the generalization of such exceptional institutions would be subject to grave objections, the most obvious of which is that they would, at the least, not contribute to the unity and certainty of the law. In this respect the Permanent Court of International Justice has a great task to fulfil. And it has shown great readiness to assert its jurisdiction in such matters, provided they were brought to it by a competent state. The most essential progressive step is here, therefore, the universalization of obligatory jurisdiction, which should be the object and endeavour of every jurist.

A more controverted issue is that of making the Permanent Court accessible to private claimants. It is objected that this would subvert not only the character of the Court but that of international law. This is a rather dogmatic objection, but it has deep and subtle roots. Indeed sovereign states may be conceived either as the last word in political organization or, so to say, as the last word but one, leaving room for a vision of organized humanity, with an organized world law, and with man as its unit. The chief obstacle to this vision working itself out is state sovereignty. The supporters of the sovereign state, and with it, of international law in its present structure, deny the capacity of humanity to integrate itself politically, and see in the individualism of man an anarchic force. They accordingly regard the idea of sovereign states being confronted on a footing of equality with individuals before the highest tribunal as involving an irretrievable loss of sovereign character and as being incompatible with the political mission of the state. A discussion of this issue lies outside the scope of this article, which is concerned only with existing law. It is enough to have characterized it, and in doing so, to have thrown some sidelight on one of the deeper meanings—and warnings—of the maxim: "Justitia fundamentum regnorum."

THE LOCAL REMEDIES RULE IN THE LIGHT OF THE FINNISH SHIPS ARBITRATION

By ALEXANDER P. FACHIRI

On July 30, 1931, the Government of Finland brought before the Council of the League of Nations a claim against the Government of the United Kingdom with regard to certain Finnish vessels used by the latter government during the Great War. The claim was based upon the contention that in the circumstances of the case the U.K. Government were responsible under international law for payment of the hire of the vessels and the value of three of them which were lost, and the Finnish Government considered that in view of their failure to obtain satisfaction through diplomatic channels and of the refusal of the U.K. Government to submit the claim to international arbitration the Finnish Government were entitled to submit the dispute that had arisen to the League. When the matter came before the Council[1] the U.K. Government raised the objection, amongst others, that the Finnish Government were not entitled to take up the case of their nationals, the shipowners, because the latter had not exhausted their local remedies under English law, and a Committee of the Council, which acted as Rapporteur, recommended that the parties should, first of all, seek a solution of this question. As a result of this recommendation an agreement was reached between the two governments, and duly signed on September 30, 1932, to submit this preliminary point to arbitration.[2] Dr. Algot Bagge, a distinguished Swedish judge, was appointed sole arbitrator and he was asked to decide the following question: "Have the Finnish shipowners, or have they not, exhausted the means of recourse placed at their disposal by British law?"

The question was fully argued before the Arbitrator[3] and he gave his reasoned decision[4] on May 9, 1934, answering the question in the affirmative.

[1] *League of Nations Official Journal*, Nov. 1931, p. 2071; Dec. 1931, p. 2249; March 1932, p. 506.

[2] The agreement is published as a White Paper, Cmd. 4179.

[3] Memorials and Counter-Memorials were submitted and an oral hearing lasting six days took place at the Foreign Office in London in September 1933, Counsel for the Finnish Government being Sir Maurice Amos, K.C., K.B.E., Professor H. Friedmann, and the writer of this paper, and for the U.K. Government the Solicitor-General (Sir Boyd Merriman, K.C., M.P.), Professor Gutteridge, K.C., and Mr. W. S. Morrison, M.P.

[4] Published for the Foreign Office by H.M. Stationery Office in 1934: price 1*s.* 6*d.*

The special interest of this case lies in the fact that it is, so far as I am aware, the only one in which the local remedies rule was, so to speak, isolated. There are, of course, a great number of decisions by international tribunals in which the question of exhaustion of local remedies arose and was adjudicated upon; but it was in proceedings dealing with the substance of the claim as a whole, the question usually arising as a preliminary objection to the right of the plaintiff state to recover. Here, on the contrary, the arbitration was concerned exclusively with the question whether the rule had or had not been satisfied, and in consequence its nature and effect were gone into with great detail and discussed with unusual fullness.

In order to understand the case it is necessary to give a brief explanation of the material facts. The vessels in question, thirteen in number, were taken over in English ports between July 1916 and March 1917. They were merchant ships belonging to Finnish companies and registered in Finland, which was at that time a Grand Duchy under the sovereignty of the Czar. The procedure adopted for taking over the ships was as follows: When they arrived at the English port the Russian Government Committee in London, a body representing the Russian Government for purposes of inter-allied war supplies and services, wrote a letter to the English agents of the shipowners informing them that "the Russian Government hereby requisition" the vessel and requesting them "to forthwith hand her over to the [British] Admiralty so as to be at their disposal until such time as they [the Admiralty] have no further need of her". Thereupon British officers went on board and took over the ship, which thereafter was operated by her own crew for account of the U.K. Government. In these circumstances the shipowners claimed hire for the vessels from the U.K. Government and also the value of the three vessels which were lost by enemy action. The U.K. Government maintained that it was the Russian Government who were liable to the shipowners, but in fact they never got any payment for the lost ships, or hire for any of the ships for the period up to December 4, 1917, when the independence of Finland was declared and other arrangements were made which are not material to the case.

It was the U.K. Government's contention that the ships were requisitioned by the Russian Government and handed over by them to the Admiralty in pursuance of an agreement between the two governments. A formal agreement, dated May 5, 1916, was produced which did not in terms cover these ships, but the U.K.

Government alleged that the deficiency was made good by subsequent agreement between the two governments arrived at partly by correspondence and partly verbally. This the shipowners contested.

In 1924 the Finnish shipowners started proceedings against the Crown before the Admiralty Transport Arbitration Board under the Indemnity Act 1920, section 2 of which gave the owner of a ship requisitioned during the war "in exercise or purported exercise of any prerogative right of His Majesty", a right to payment for the use of the ship and compensation for any loss or damage thereby occasioned, such payment or compensation to be assessed by the Board, which had all the attributes of an ordinary court. The Statute went on to enact that the decision of this tribunal should be final, subject only to this, that "if either party feels aggrieved by any direction or determination of the tribunal on any point of law" he could appeal to the Court of Appeal, and with the leave of that Court to the House of Lords.

On January 29, 1926, the Board, which was presided over by Lord Trevethin, late Lord Chief Justice of England, gave judgment dismissing the claim.[1] The tribunal held that in order to succeed under the Indemnity Act it was necessary to prove as a fact that the ship was requisitioned by the British Government, and after dealing with a number of points, both of law and fact, that had been raised by the parties, stated that "we find as facts: (1) That these steamers were not nor was either of them requisitioned by or on behalf of Great Britain. (2) That they were each of them requisitioned by or on behalf of the Government of Russia."

The shipowners did not appeal from this decision.

When the matter came before the League of Nations the Finnish Government, who had taken up and adopted the case, were, of course, bound to state the grounds of their claim against the U.K. Government, and it will be seen later that the way this was done has an important bearing upon the subject of this paper.

The Finnish Government contended: (1) That in substance and in fact the taking over of the ships was the act of the U.K. Government, and therefore they were, under international law, bound to pay compensation to the shipowners, on the analogy of the *jus angariae*. (2) Alternatively, that assuming (contrary to

[1] Annual Digest of Public International Law Cases, 1925–6, Case No. 49. *Report of the Admiralty Transport Arbitration Board*, dated July 7, 1927, and published by H.M. Stationery Office.

the Finnish contention) that there was an agreement between the U.K. and Russian Governments providing for the payment by the former to the latter for these ships, such payment could under international law be recovered by the Finnish Government from the U.K. Government. This alternative contention was formulated in more than one way at different stages, and the terms at first used suggested that the right to payment by the U.K. Government accrued to the shipowners themselves, but it was made plain before the Arbitrator that this was not intended, the Finnish case on this point being that the international agreement, if it existed, created rights and obligations as between the two governments only.

The British case before the Arbitrator was that the Finnish shipowners had failed to exhaust their local remedies in three respects: (1) by not appealing from the decision of the Admiralty Transport Arbitration Board under the Indemnity Act, (2) by not having submitted their claim to the sister tribunal, the War Compensation Court, under the Indemnity Act, and (3) by not having presented a Petition of Right to the Crown at common law.

It was common ground between the parties that the question submitted to the Arbitrator was to be considered with reference to the international rule as to the exhaustion of local remedies and that the issue was whether or not the shipowners had complied with the requirements of the rule. It was therefore necessary to ascertain its meaning and scope, and much argument was devoted to this purpose. The following passage from the Memorial of the U.K. Government contains such a clear exposition of the principles underlying the rule—a subject which is not too satisfactorily dealt with in the books—that it may be useful to quote it in full. It can, I think, fairly be said that the principles here enunciated were generally accepted by both sides and by the Arbitrator.

"When a state makes a claim against another in respect of an alleged injury to its nationals, the state itself becomes the claimant and the basis of its claim must be an injury done to itself in the person of its nationals, and it must establish that this injury is the result of a breach of an international obligation by the state against whom the claim is made. The international obligation may be an obligation resulting from treaty or an obligation existing under the general law of nations. Consequently, though the claim may originate in a dispute between its nationals and the government of the state against whom the claim is made, and may relate to the same set of facts, the issues arising out of the diplomatic claim are different and the parties are different. The claimant state must rely upon and establish a breach of international law, and the question is therefore one to be determined by international law, whereas the original dispute between the nationals and the respondent government is one which must

depend upon municipal law, seeing that international law regulates the rights and obligations of states towards each other and, as such, creates neither rights nor obligations for individuals. Though a diplomatic claim for compensation in respect of alleged injuries to nationals may be commonly spoken of as the claim of certain individuals, and though its amount may (though it is not necessarily so) be dependent entirely upon the material damage suffered by those individuals, it is not, in law, the claim of the individuals, but that of the state by which it is made. The state must claim on the basis of injury done to itself in the person of its nationals, and the compensation, if any, due is payable by the respondent state to the claimant state, and the respondent state (apart from express contract) is not interested in, nor entitled to concern itself with, the manner in which the claimant state disposes of the compensation when it has received it.

"For present purposes the essential points to be remembered are (*a*) that if a diplomatic claim is made the claimant state must establish a breach of international law, and (*b*) that consequently the issues upon a diplomatic claim are, in their nature, essentially different from the issues which arise in the previous dispute between the respondent government and the individuals concerned.

"The rule with respect to the exhaustion of municipal remedies is sometimes stated by learned writers upon the basis that, unless and until the municipal remedies have been exhausted by the individuals concerned, no breach of international law in relation to the treatment of individuals upon which a diplomatic claim can be founded can have been committed. In other learned works the position is adopted that a breach of international law in respect of the treatment of individuals may exist as soon as the acts complained of are committed, but that, under international law, the respondent state has, first of all, the right of making redress by its own methods and in its own way, and the recourse to municipal remedies is the manner in which the state has the right thus to discharge its liability. Every claim in respect of the treatment of individuals may involve questions of law and of fact. These have to be appreciated fully before the respondent state can determine whether the case is one where it is called upon to pay compensation or not. It is entitled to the pronouncement of its tribunal upon these questions before it makes its decision. For the reasons which will be stated in the following paragraphs, it is probable that both these statements of the position are correct and that they both[1] apply to different types of cases.

"Individuals, when residing, conducting business, or possessing property in a foreign state, acquire rights and duties, and are entitled, if their rights are infringed, to redress. But these rights, whether they arise out of their contracts with other private individuals or with the officials of the government of the foreign state, are rights under municipal law. That this is so in the ordinary case is obviously incontestable, but the weight of scientific authority, supported by the Permanent Court of International Justice, goes farther, and is to the effect that individuals cannot acquire rights or obligations under international law.

"One of the most fundamental obligations of a state in international law is that it should establish in its territory a municipal law which will define and regulate rights where foreign nationals are concerned. As to the manner in which its municipal law is framed, the state has, under international law, a complete liberty of action, and its municipal law is a domestic matter in which no other

[1] *Quaere*, "respectively".

state is entitled to concern itself, provided that the municipal law is such as to give effect to all the international obligations of the state. The international obligations of a state which may be relevant in connexion with the manner in which this municipal law is framed may be special treaty obligations or obligations under the general law of nations, and the most important obligation under the general law of nations is that a state's municipal law should be such as to be consistent with the fundamental principles of justice, or, in other words, that it should comply with and not fall below a certain minimum standard of right, equity, and civilized procedure.

"If the municipal law of a state fails in any respect to comply with its international obligations (whether special treaty obligations or the general obligation to have a municipal law which complies with the fundamental principles of justice), and if foreign individuals are prejudiced thereby, this, in fact, constitutes a breach of international law.

"Every system of municipal law must, however, to be effective, be administered by courts or other tribunals, and a second fundamental obligation of states under international law is to have courts and tribunals to enforce rights acquired under municipal law and to decide disputes. In the constitution of these courts and tribunals, the state, under international law, has complete liberty of action, subject only (apart from express treaty provisions) to the general obligation that these courts and tribunals must, in their administration of the law, comply with the fundamental principles of justice, or, in other words, that their conduct must be impartial, and must not fall below a certain minimum standard of efficiency.

"If, in any case, the administration of justice by the courts of a state fails to comply with its international obligations, and a foreign individual is prejudiced thereby, this failure constitutes a breach of international law.

"It follows, therefore, that in most, if not in all, the cases in which foreign individuals are concerned, the breaches of international law which a state must rely upon in making a diplomatic claim are a failure of either (*a*) the municipal law, or (*b*) the municipal courts, to comply with the international obligations of the state, and it is obvious that all the cases under (*b*), and most, if not all, the cases under (*a*) can only be established if and when recourse has been had to the municipal tribunals and the remedies available there exhausted. It is true, therefore, that in most cases a breach of international law in relation to the treatment of individuals can only arise when the municipal remedies have been exhausted.

"There may, however, be other cases, far less frequent in practice, where it can be said that a breach of international law has been committed by the very acts complained of and before any recourse has been had to the municipal tribunal. It is thought that this can only be the case where the acts complained of are those committed by the respondent government itself or its officials, since it has no direct responsibility, under international law, for the acts of private individuals. In these cases, then, the other statement of the rule respecting municipal remedies applies, that is to say, that a respondent state is first entitled to do justice in its own way and through the means of recourse which are open to the injured individuals before its own tribunals, and it is only if and when such means of recourse either do not exist, or have been tried and found defective, that a diplomatic claim may be made.

"It is clear that, if a case is to fall into this latter class, it is essential that the original act complained of must itself have been an act contrary to international law, creating an initial liability under international law."[1]

The Finnish Government contended that the present case was of the second class here referred to. The U.K. Government, whilst maintaining that the case came within the first class, considered that it was unnecessary to decide the point as the scope of the local remedies rule was the same in either case. This the Finnish Government disputed, holding that the distinction between the two classes was an important one which affected the application of the rule: in the one case, there must be a denial of justice (in the narrow sense) in order to create an international cause of action, whereas in the other the breach of international law is itself the cause of action and the local remedies rule only comes in to determine the propriety of an international claim. Accordingly, in the Finnish Government's view, the scope of the rule, in cases of the second class, is limited to this—that the claimant state must satisfy itself that its nationals have exhausted their local remedies. If so satisfied the state is entitled to take up the case and make it the subject of an international claim. The opposing government may object to dealing with the claim on the ground that local remedies have not been exhausted and in this way a deadlock may arise, but if the objection is referred to arbitration the question for the tribunal is whether the claimant state is reasonably justified in its view.

It was common ground between the parties that a mere right to take proceedings is not necessarily a "local remedy" within the meaning of the rule—the only proceedings to which resort must be had are proceedings capable of affording redress. This recognized principle is usually embodied in the statement that a local remedy must be "effective", and there was much controversy between the parties as to what this epithet implies. According to the U.K. Government, before it can be said that there is no effective remedy it must be "perfectly plain" that municipal law offers no remedy in the circumstances of the case. If there is "any doubt" all possible proceedings under the municipal law must be pursued to the end. According to the Finnish Government it is sufficient if the claimant government is reasonably justified in concluding that the municipal law offers no remedy.

Another important point arose, which does not appear to have been considered in previous cases, namely, what is the basis upon

[1] Memorial submitted by H.M. Government in the U.K., paragraphs 34–42.

which the question whether the municipal law affords a remedy must be considered? The U.K. Government contended that the question must be considered "upon the hypothesis that every allegation of fact in the claim is true and every legal proposition upon which it is based is correct". The reason for adopting this hypothesis was said to be that it was necessary in order to prevent a case from escaping the operation of the rule merely because it was a bad case. If a claim, objectively considered on the true facts and law, had no merits it would naturally be rejected by the municipal courts, but this would not mean that there was a failure of local remedies. It was absurd to suggest that the rule applied to meritorious but not to unmeritorious claims. The only way, therefore, to test whether the rule had been complied with was to consider the claim on the assumption that every point both of fact and law raised in support of it was a good point, and to see whether, on that assumption, there was a remedy under the municipal law. The Finnish Government, on the other hand, maintained that it was a confusion of thought to introduce the question of merits in applying the rule. If a claim was palpably bad, presumably a responsible government would not take it up, and if they did they would not succeed. The local remedies rule was not devised to prevent international claims from being made because they are ill founded, but for quite a different purpose, namely, where, as in the present case, the claim is based upon an initial breach of international law, to give the respondent state an opportunity of redressing the wrong alleged. The Finnish Government therefore submitted that whilst it was permissible to proceed upon the hypothesis that the allegations of fact in the claim are true, as regards the law the case should be considered upon the basis of the legal propositions reasonably arising out of the facts alleged. If a legal contention which is manifestly absurd has been put forward at some time or other in support of the claim it is idle to assume that such contention is well founded and to ask: What would the claimants' rights be under municipal law upon that erroneous hypothesis? for obviously they would have none. But it is not necessary, on the other hand, to insist that before a legal proposition is taken into account its correctness (on the assumed facts) must be conclusively established. It is sufficient if the proposition is reasonably arguable so that it cannot be said in advance that the municipal court would reject it, as in this case there may be ground for holding that a local remedy existed. A proposition of law of this character may therefore be assumed to be correct for

the purpose of seeing whether, under the international rule, resort should have been had to the municipal means of redress.

The Arbitrator dealt with the points alluded to above as follows: He observed that there were three preliminary questions:

1. Which allegations of fact and propositions of law are to be considered by the Arbitrator?
2. Are the allegations and propositions thus to be taken into account when applying the local remedies rule to be considered as well founded?
3. Is the local remedy to be held ineffective only where it is obviously futile to have recourse to it on the allegations and propositions which are to be taken into account, or is it sufficient that such a step only appears to be futile?[1]

As to the first question three alternatives had been suggested with regard to the allegations and contentions which must be taken into account for the purpose of determining whether the local remedies rule has been satisfied: (*a*) Every plausible allegation and contention by which the individual claimants could, or probably could, have obtained from a municipal tribunal a decision on the merits of their claim provided they had formulated their claim in the right way. (*b*) Only the allegations and contentions brought forward by the Finnish Government before the League. (*c*) The allegations and contentions brought forward by the Finnish Government before the League plus the additional contentions, if any, of the shipowners before the Admiralty Transport Arbitration Board.

The Arbitrator observed that the British argument was that in order to satisfy the local remedies rule it is necessary that all points, both of law and fact, should have been raised and submitted to the municipal tribunal and pronounced upon by it, and that it was therefore necessary to see how the claimants formulated their claim and to examine the grounds upon which it was based and then see whether the various contentions could have been taken before the Admiralty Transport Arbitration Board, in the first place, and before the Court of Appeal in the second place. Whilst the U.K. Government did not contend that every possible legal argument which could have been used ought necessarily to have been taken before the Board, they did say that if it was a legal argument which, if sound, was necessary in order to establish the claim you must treat it as one which must be raised in

[1] *Decision*, pp. 19–20.

the court of first instance. The British view, therefore, was that alternative (*a*) should be adopted.

The Arbitrator rejected this contention. He held in effect that it was necessary to distinguish between international claims of the two classes alluded to above, viz. international claims arising out of alleged failure of municipal law or courts, on the one hand, and out of an initial breach of international law, on the other. In cases of the first class it would (he said) be natural to hold that all relevant facts and points of law which could support the private claim should be taken into consideration. Otherwise a failure of law or courts could not be ascertained. But the position was different in cases of the second class. In such cases the local remedies rule served only the function explained by the U.K. Government and accepted by the Finnish Government to the effect that the respondent state is entitled, first of all, to discharge its responsibility by doing justice in its own way; or, to put it in the other way in which the principle had been expressed, that the respondent state is entitled to have the questions of law and fact which the claim involves investigated and adjudicated upon by its own tribunals, and then on the basis of such adjudication to appreciate its international responsibility and meet or reject the claim accordingly.

The U.K. Government sought to bring the present case within the first class and said that the English courts were being arraigned by the Finnish Government for not doing justice to people. In saying this, the Arbitrator observed, the U.K. Government could only mean that the Finnish Government contended that the claim rejected by the Admiralty Transport Arbitration Board was a meritorious claim. The Finnish Government had never suggested an arraignment of English courts in any other sense. But a rejection of a meritorious claim by an English court does not in itself under international law create any liability for the U.K. Government.

He went on to point out that both governments were agreed that there may be cases where it can be said that a breach of international law has been committed by the very acts complained of and before any recourse has been had to the municipal tribunal. These acts must be committed by the respondent government or its officials, since the state has no direct responsibility under international law for the acts of private individuals. The Finnish Government contended that the situation alleged to have arisen by the taking and using by the British authorities of the Finnish ships without paying for them constituted such a case. The

Arbitrator being of opinion that these views were well founded, observed that the *raison d'être* of the local remedies rule, in a case of an alleged initial breach of international law, can only be that all the allegations of fact and propositions of law which are brought forward by the claimant government in the international procedure as relevant to their contention that the respondent government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal courts up to the last competent instance, thereby also giving the respondent government a possibility of doing justice in their own ordinary way.

The consequence was, in his opinion, that in a case of an alleged initial breach of international law, the rule that the respondent state "is entitled to the adjudication of its own tribunals upon the questions of law and fact which the claim involves" can bear only on the allegations of fact and propositions of law put forward by the claimant government in the international procedure and that the opportunity of "doing justice in its own way" ought to refer only to a claim based upon these contentions. If the claimant government do not maintain certain of the contentions advanced and rejected in the municipal courts, though perhaps, in fact, these contentions are relevant to the success of the international claim, the disadvantage is on the side of the claimant government. The respondent government have no reasonable interest to insist that, as a condition precedent to further international proceedings, such contentions, perhaps repudiated by the claimant government and at all events not put forward as a basis of their claim, should be subject to the investigation and adjudication of the municipal courts, and it does not seem reasonable to ask the claimant government in the international procedure to advance and defend propositions which they hold to be wrong.

The Arbitrator added that the Finnish Government could not before him withdraw a point of law which they had urged before the League.[1]

He therefore adopted alternative (*b*) above, and it is to be observed that in applying the crucial test for the purposes of this first question—namely, which of the two classes does the international claim come under—it was the way in which the claim was formulated by the claimant government which was the determining factor. The Arbitrator did not decide—and indeed could not properly have done so—that there had in fact been an initial

[1] *Decision*, pp. 20–6.

breach of international law by the U.K. Government, but he held that, for the purpose of determining what allegations and contentions must be taken into consideration in applying the local remedies rule, it was to be ascertained from the allegations and contentions of the claimant government whether they were alleging and relying upon a failure of courts or law on the part of the respondent state, or upon an initial breach of international law.

On the second question the Arbitrator substantially upheld the British view, and decided that in considering whether there was an effective remedy before the municipal courts the case must be considered on the hypothesis that, in so far as they are to be taken into account under the above-mentioned ruling, every allegation of fact in the claim is true and every legal proposition upon which it is based is correct. The only qualification is that, where it is a question of remedy on appeal and the allegations of fact maintained by the claimant government but rejected by the Admiralty Transport Arbitration Board were not appealable, such allegations cannot be taken into account.[1]

On the third question the Arbitrator also accepted, in effect, the British submission. On the authority of Borchard[2] he observed that "a certain strictness" in construing the international rule appeared to be justified, and held that the local remedy was only to be considered ineffective where recourse is "obviously futile".[3]

On the basis of the three rules referred to above, the Arbitrator proceeded to consider whether appeal by the shipowners to the Court of Appeal from the judgment of the Admiralty Transport Arbitration Board afforded an effective remedy. This meant, as he pointed out, an examination of the question whether there were any appealable points of law in the judgment and whether those points of law, if existent, were "obviously insufficient" or not on appeal to reverse the decision of the Board.[4] A large part of the Award is devoted to this purpose, but its interest is mainly confined to the particular circumstances of the case, and it is therefore unnecessary to discuss this part of the decision at length. Suffice it to say that after very careful consideration of all the points

[1] *Decision*, pp. 37–8.

[2] *Diplomatic Protection of Citizens Abroad*, § 383: "In a few prize cases it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."

[3] *Decision*, pp. 27–8.

[4] *Decision*, p. 28.

raised, including the thorny problem of the distinction in English law between a question of law and a question of fact, the Arbitrator came to the conclusion that the Board found that the Russian Government "took" the ships, that this, at any rate (unlike the question of "requisition"), was a pure question of fact, and that this finding of fact, from which there was no appeal, made it impossible to appeal successfully on any of the appealable points of law.

With regard to the second alleged local remedy relied upon by the U.K. Government, viz. the War Compensation Court, the Arbitrator upheld the Finnish contention. The Court was given jurisdiction by the Indemnity Act of 1920 to award payment or compensation in respect of loss or damage sustained by reason of interference with property or business in the United Kingdom through the exercise, or purported exercise, during the war of any prerogative right of His Majesty. The Arbitrator pointed out that the finding of the Admiralty Transport Arbitration Board that the Russian Government "took" the ships was conclusive of any claim based upon British interference with property or business in exercise of prerogative right. Any subsequent dealing with the ships by the British Government could not be a matter of sovereign or prerogative right but only of arrangement with the Russian Government. The Russian taking having been finally determined by the Board, proceedings before the War Compensation Court, a tribunal of co-ordinate authority, involving the same issues of fact would, even if not barred under a formal plea of *res judicata*, have been perfectly futile, and liable to be treated as frivolous and vexatious.

The third alleged remedy, viz. Petition of Right, was dealt with as follows: The Arbitrator pointed out that under the Indemnity Act, as interpreted in *Brocklebank Ltd.* v. *The King*, [1925], 1 K.B. 52, only Petitions of Right based upon express contract with the Crown were excepted from the general bar imposed by the Act on common law proceedings in respect of war claims, and it was common ground between the parties that there was no express contract between the shipowners and the U.K. Government. Moreover, this remedy was not to be taken into account for another reason. The Finnish Government had expressly disclaimed as a ground of their claim any contractual relations, whether express or implied, between the shipowners and the U.K. Government, and therefore, according to the rules laid down by the Arbitrator as mentioned above, this ground of claim, which

alone would have made a Petition of Right possible, must be excluded in considering whether there was a local remedy.

Having thus dealt with each of the remedies relied upon by the U.K. Government, the Arbitrator answered the question[1] submitted to him in the affirmative.

A subsidiary point dealt with in the proceedings may also be mentioned. The Finnish Government took the objection that compensation under the Indemnity Act was limited, as regards hire of ships, to Blue Book rates, which were considerably lower than market rates. The U.K. Government, whilst not admitting that Blue Book rates were lower than market rates, contended that Blue Book rates were, in any event, substantial, and fully satisfied the requirement that a local remedy must be "adequate". But they went farther and maintained not only that it was no excuse for not having recourse to a municipal tribunal that it was not in a position to award all the compensation to which the state of the claimants considered that they were entitled, but also that the claimants were bound to have recourse to the municipal tribunal even if it was not in a position to award any compensation at all. The British argument was that inasmuch as a claim is dependent upon certain allegations of fact which may be disputed and upon certain legal contentions which may be doubtful, the respondent government is entitled to the decision of its own court upon these points before taking its decision to pay, or refuse, compensation. Authorities were cited, on the one side, to show that even administrative tribunals with merely advisory powers have been treated as affording a local remedy which must be resorted to, and, on the other, in support of the conflicting principle of adequacy.

The Arbitrator held that the compensation payable under the Indemnity Act did not fall short of what the authorities meant by an "adequate" remedy, but he expressed disapproval of the extreme view that recourse must be had even to a tribunal without power to award compensation. What he said was this:

"It appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts only to exhaust what to him—at least for the time being—must be only a very unsatisfactory remedy; and although the Arbitrator is aware that the contrary opinion has been frequently expressed, the Arbitrator is inclined to find it doubtful whether the fact that such a kind of exhaustion has not taken place always can give the respondent state the right to object to an international interposition."

[1] See above, p. 19. "Have the Finnish shipowners, or have they not, exhausted the means of recourse placed at their disposal by British law?"

Having now dealt, however inadequately, with the main points of this complicated case, it may be useful to try to summarize the effect of the decision.

It touches upon two general principles relating to the nature of the local remedies rule:

1. It is an authority for the view that international responsibility may be incurred by a state in respect of injuries caused to private foreigners even before they have resorted to, or exhausted, their local remedies. Such responsibility is incurred where, but only where, the matter complained of, being the direct act of the government, itself constitutes a breach of international law. But although the initial breach of international law gives rise to international responsibility an international claim by the government of the injured individuals does not lie unless and until they have exhausted their local remedies, if any.

There is nothing particularly novel in these propositions, but it has been a matter of controversy whether international responsibility comes into existence upon the commission of the original wrongful act or only after the rejection of the injured individual's claim by the municipal courts, and the question of principle involved is an important one.

2. The Arbitrator's view that a local remedy is not to be regarded as "adequate", and therefore need not be resorted to, if the municipal tribunal is not in a position to award compensation, embodies a sensible principle which should, it is submitted, be followed in other cases, although it must be admitted that the observations in question, which are cited above, were *obiter*.

But the real importance of the decision consists, I think, in the determination of the basis upon which the question "Have local remedies been exhausted?" is to be considered. The following rules may be said to have been laid down in this connexion:

1. When an international claim in respect of an "initial breach of international law" is made by one government against another and the respondent government raises the objection that the claimant government's nationals have not exhausted their local remedies this question falls to be considered exclusively in the light of the case put forward by the claimant government. In the ordinary course of things the international claim will be advanced in diplomatic correspondence, in which the allegations and contentions relied upon by the claimant government will be stated. If the respondent government take the objection in question they

must base their arguments upon those allegations and contentions and nothing else, leaving aside, on the one hand, any allegations or contentions made by the individuals concerned either in legal proceedings or in negotiations with the respondent government, and, on the other, points arising out of objective consideration of the case on its own merits.

2. In the case of an international claim based upon failure of courts or law a different rule applies. Here the Arbitrator's view was that all relevant facts and points of law which could support the private claim ought to be taken into consideration. By this it would appear that he meant what is referred to above[1] as alternative (*a*), namely, every plausible allegation and contention, whether actually put forward at any stage or not, by which, if put forward by them, the individual claimants could have obtained from a municipal court a decision on the merits of their claim. Accordingly, in a case of this class the respondent government can, it seems, go outside the terms of the international claim as presented, for the purpose of showing that local remedies have not been exhausted, although as regards facts it is submitted that such government is confined to plausible allegations based upon alleged facts relied upon either by the private claimants or the claimant government. It would not be open to the respondent government to bring forward entirely new facts and say that on that basis there was a local remedy. The question of the true facts and merits of a claim must always be kept distinct from the question "Have local remedies been exhausted on the footing of the case you have put forward?"

3. The question whether an international claim comes within (1) or (2) above depends upon the way the claimant government frame their case. In other words, the question which class the claim belongs to is not to be determined by an objective investigation of the case on its merits, but solely upon the allegations and contentions put forward by the claimant government in the international claim.

It is obvious that these three rules make it incumbent upon the claimant government to exercise great care in formulating the international claim, particularly as, according to the decision in the present case, a contention once put forward by them cannot be afterwards withdrawn in so far as its effect on the question of local remedies is concerned.

[1] See p. 27 above.

4. In a case of initial breach of international law every allegation of fact and every contention of law[1] put forward by the claimant government in the international procedure must be assumed to be well founded for the purpose of determining whether local remedies have been exhausted. In other words, where in a case of this class the objection of non-exhaustion is raised the respondent government is entitled to take the representations of the claimant government point by point and to show, if they can, that on the assumption that the facts are truly stated and that the propositions of law relied upon are correct, it would have been competent for the individuals concerned to take such and such proceedings under the law of the respondent state.

This rule is not applicable as it stands to a claim based upon failure of municipal law or courts. In such a case as stated under rule 2 above it appears to be open to the respondent government to rely not only upon the cases actually put forward by the claimant government or the individual claimants but also upon any other plausible allegation or contention which if put forward would have enabled the latter to obtain a decision on the merits in the municipal courts. It is submitted that a distinction must be made, as regards the validity to be attributed to them, between allegations and contentions put forward by the other side and those put forward by the respondent government itself. Those put forward by the other side, if "relevant" or "plausible", must, no doubt, on the analogy of rule 4 above, be assumed to be correct for the purpose of determining whether local remedies have been exhausted. As regards those put forward by the respondent government itself, it is submitted that it would be necessary first of all to consider (*a*) whether the allegations of fact arose out of allegations relied upon by the private claimants or claimant government, and (*b*) whether the contentions of law were, from the point of view of the municipal law, reasonable contentions. If and so far as the answer to these questions is Yes, but only on that condition, then, it is submitted, the allegations and contentions put forward by the respondent government must also be assumed to be well founded for the purpose of determining whether local remedies have been exhausted.

In passing be it said that it is clear from the authorities that

[1] It is clear that the contentions which must be assumed to be well founded, under the rule laid down by the Arbitrator, are the claimant government's contentions relating to the respondent government's alleged initial breach of international law. The claimant government could not affect the application of the local remedies rule by contentions relating directly to the remedies available under the law of the respondent state.

the means of recourse open to the injured individuals must in all cases be considered as at the time of the alleged cause of action. The question is "What proceedings could they have taken if they had used all due diligence from the first?" not "What proceedings are open to them at the date of the international claim?"

5. If on the basis of the foregoing rules there would have been any proceedings at all open to the individuals concerned the test to be applied is: "Would recourse to such proceedings have been obviously futile?" If not, the objection of non-exhaustion of local remedies is valid. This rule, it is submitted, applies equally to claims of both classes.

It may perhaps be permissible to express regret that the learned Arbitrator did not elaborate his reasons for the conclusion that this was the proper test. I venture to suggest that there is a good deal to be said for a somewhat broader and more elastic test, of the nature supported by the Finnish Government, at any rate in cases of initial breach of international law. It seems hard that a government should be precluded from taking up a claim for what they may regard as a grave injury to their nationals, resulting from a breach of international law, notwithstanding the fact that those nationals may have done all that reasonable men would be called upon to do in the circumstances by way of exhausting their remedies under municipal law. There are many instances where any sound lawyer would advise his clients that their case did not offer sufficient prospect of success to justify an action, and in such cases it seems hardly right that the international rule should operate to bar the government's claim. This is the more so when it is remembered that the result of taking proceedings cannot, in many cases, be put to the test when the international claim is made, as more often than not the cause of action has by that time become barred by prescription. And yet the claimant government is for ever precluded from obtaining redress by international action. But whatever may be the force of these considerations, it cannot be said that the Arbitrator's decision on the point is against the weight of authority, and his view must probably be taken to represent the actual rule of international law.

AIRCRAFT AND COMMERCE IN WAR

By H. A. SMITH

We are told by Oppenheim[1] that "the right of visit and search may be exercised by all warships and military aircraft of the belligerents". So far as aircraft are concerned, neither the author nor his successive editors pursue the matter farther, and for the most part the writers of standard text-books seem to be reluctant to analyse the important issues of law which this question involves. A notable exception to the general rule of silence is to be found in the last chapter of Dr. Spaight's valuable work, *Air Power and War Rights*,[2] and the indebtedness of this article to Dr. Spaight's ideas will, I hope, be fully apparent.

A by-product of the Washington Conference was the Committee of Jurists which met at The Hague in 1922–3, and this committee drew up two drafts of rules[3] dealing respectively with the use of radio and with aerial warfare. In each case the rules drawn up were for the most part based upon the practice of the Great War. They have never been embodied in treaty form and have no binding force, but they form the necessary basis of all subsequent discussion upon the matters with which they deal. Unfortunately it proved impossible to reach any agreement upon the problem of the use of aircraft in the war against enemy trade. Upon this question a deadlock arose out of the refusal of the American delegates to accept any text which sanctioned the practice of compulsory deviation, a difficulty which is not specially connected with the question of aerial warfare. In the result we are left without any authoritative guidance, and the problem must therefore be approached in the light of principle.

On one point perhaps it is reasonable to expect general agreement. In exceptional cases it is possible for an aircraft riding on the water to perform the regular operations of visit, search, and capture in the same manner as a warship. Dr. Spaight (p. 471) has given a few examples of this practice which occurred in the course of the Great War. In such cases the aircraft is really for the time being equivalent to a ship, and there seems to be no reason why she should not be governed by the same rules. But these cases are

[1] *International Law*, 5th ed., Vol. II, p. 706.

[2] 2nd ed., 1933.

[3] Cmd. 2201 of 1924, and *American Journal of International Law*, Vol. XVII (1923), pp. 245–60 (Supplement).

clearly exceptional, and the real difficulty lies in the problem of applying the accepted maritime rules to aircraft in flight.

There are two possible methods of approaching this problem. One is to accept the theory propounded by the German Naval Staff in 1916, that new weapons make their own rules.[1] This theory only needs to be mentioned because in fact it found expression in the "unrestricted" submarine warfare of 1917. That experiment failed, and it is now safe to say that the doctrine upon which it was based has called down general condemnation. If formal expression of this condemnation be needed, it is to be found in Part IV of the London Naval Treaty of 1930, which lays down "as established rules of international law" the principle that "in their action with regard to merchant ships, submarines must conform to the rules of international law to which surface ships are subject". This treaty, as signed and ratified, is binding upon the British Empire, the United States, and Japan. More recently it has received the explicit assent of Germany and France, and we may now reasonably assume that any future submarine warfare which disregards the treaty will be reckoned as a deliberate defiance of the law of nations.

What is true of the submarine must be equally true of the aircraft, and this article is therefore written upon the alternative assumption that air operations must conform to the existing rules of law, unless and until these are changed by common consent. If that be so, certain results follow.

In the first place, it is clear that an aircraft in flight cannot possibly comply with the full procedure of visit and search according to the accepted rules. The utmost that she can do is to convey messages or orders to the merchant vessel, and to use force if lawful orders are disobeyed. We must therefore ask ourselves what are the rights and duties of merchant vessels in time of war. These will depend upon whether the ship in question is enemy or neutral.

With a few exceptions, such as hospital ships, an enemy merchant vessel is good prize irrespective of her cargo, employment, or destination. Being absolutely liable to seizure, she has the corresponding rights of self-defence and of escape, but, if she attempts to exercise these rights, her pursuer is entitled to use so much force, even to the point of destruction, as may be necessary to compel her submission. If she submits peacefully, no force may

[1] "The new international law which has been brought into being by the U-boat provides its own lines of conduct" (*Official German Documents Relating to the World War*, Carnegie edition, p. 1267).

be used against her, and it is the duty of the captor to send her in for condemnation by a prize court. If it is impossible to send her in, he may destroy her, but the right of destroying a vessel which has peacefully surrendered only arises after seizure, and is subject to the absolute duty of providing for the safety of crew, passengers, and papers.

A neutral merchant vessel is *prima facie* immune, and may only be detained or seized for some definite reason, such as breach of blockade, carriage of contraband, or unneutral service. These reasons can only be established after visit and search, submission to which is a duty imposed upon the neutral. The neutral has therefore no right of resistance or escape, which the captor is entitled to prevent by force. Armed resistance, unless it be in self-defence, exposes the master of the merchant ship to the risk of punishment as a *franc-tireur*. Visit and search can do no more than establish a case for the detention of a neutral, and her liability to seizure can only be determined by the decision of a prize court. Practice has now settled that even a neutral prize may in exceptional cases be destroyed, but this exceptional right does not discharge the captor from the burden of proving his case before a prize court. The only difference which it makes is that the court, in the event of the seizure being proved unlawful, must decree compensation instead of restitution.

In each case it is clear that force can only be used against a merchant ship in order to enforce obedience to lawful orders. A lawful order can only be an order to surrender or submit to a vessel which is capable of carrying out the proper procedure. Since an aircraft in flight is incapable of carrying out this procedure, it follows that the merchant ship, whether enemy or neutral, cannot be ordered to surrender or to submit to the aircraft herself. The right of destruction, as distinct from the right to use such force as is required to compel obedience, is a right which only arises after capture, and then only in exceptional circumstances.

From this it follows that in operations against commerce an aircraft can only function as the messenger or agent of a warship, since the duty of the merchant vessel to surrender or to submit to visit and search is correlative to belligerent duties which can only be performed by a warship. Whether the aircraft flies from the deck of the warship or from somewhere else would seem to be immaterial, so long as the orders which she conveys emanate from the ship which undertakes responsibility for the capture. All rights must be reasonably exercised, and the capturing warship,

whether at sea or in port, must therefore be within reasonable distance of the merchant vessel concerned. The essence of the matter is that the aircraft in flight can only assist the warship in exercising the right of visit and search, a right which by its nature can only be exercised by a ship.

If this view be correct, its practical application will work out as follows. If the chase is an enemy merchant ship, the aircraft may convey to her a message summoning her to surrender to a neighbouring warship. Assuming the order to be obeyed, no violence is permissible. If the vessel tries to escape, so much force may be used as is necessary to compel surrender. She is not entitled to fire upon the aircraft unless she is first attacked herself, but she may resist force to the limit of her power, and it may well be that she is destroyed in the course of combat. Once she has surrendered, it is the duty of the capturing warship to send her into port for condemnation. In the past a prize has usually been sent into port in charge of a prize crew, and in principle there can be no objection to using an aircraft in lieu of a prize crew. This would be no more than an adaptation of practice to meet changed conditions of warfare, a modification of procedure rather than a change of law. If urgent military reasons make it impossible to send the prize into port, she may be destroyed, but there is an absolute duty to make provision for the safety of the crew, the passengers, and the papers.

If the chase is neutral, the only order which may lawfully be given to her in the first instance is an order to submit to visit and search. Unless the aircraft is capable of alighting on the water, the visit must obviously be carried out by the warship, which must therefore be within reasonable distance of the ship visited. If the visit discloses no reasonable ground of detention, the neutral must be allowed to go on her way in peace. On the other hand, the visiting officer may perceive some suspicious features, in which case the vessel must be detained for search. With all this procedure the aircraft can have nothing to do. Postponing for the moment the question of search in port, let us next assume that the search discloses evidence which justifies the commander of the warship in sending his capture before the prize court. From this point onwards what has been said above about the enemy merchant vessel applies equally to the neutral. She must be sent into port either in charge of a prize crew or under aircraft escort. In exceptional and urgent circumstances it is now agreed that even a neutral prize may be destroyed after capture, subject

always to the essential condition that the crew, the passengers, and the papers must be preserved.

The question of compulsory deviation for the purpose of search in port arose, though not for the first time, in the Great War. The Government of the United States protested against the practice, and to this protest Great Britain replied that under modern conditions the ancient procedure of search at sea was usually impracticable. The protest does not seem to have been seriously pressed, and in the latter part of the war the American navy co-operated fully in all the Allied operations. In itself the question of deviation for search has no necessary connexion with the problem of the use of aircraft, and it is only relevant to the present discussion because the American objections upon this point prevented The Hague Committee from drafting an agreed text upon the questions of air operations against commerce.

Whatever may be the theoretical objections, it is scarcely possible to doubt that the precedents of the Great War will be followed, and that we may expect compulsory deviation to become a normal practice in future wars. So far as aircraft are concerned the question raises no new difficulties. In principle the deviation is merely a prolongation of the detention which is necessary for the purpose of search. It goes without saying that the right, if it be conceded, must be reasonably exercised, and that the neutral therefore must not be ordered to proceed to a port which is unreasonably remote from her normal course. Practical considerations point the same way, for the great difference in speed between an aircraft and a ship would make it impossible for the aircraft to act as escort for more than a short distance. Within these limits there seems to be no reason why the aircraft should not perform the function of a prize crew and bring a merchant vessel, which has already been visited, into port for search.

If deviation for search be conceded, there can in principle be no objection in proper cases to allowing the diversion to take place before visit, that is to say, without insisting upon a formal boarding of the suspected vessel. The purpose of visit is to ascertain whether there are any grounds for search and detention. Under modern conditions it will often happen that the evidence justifying detention is already in the hands of the belligerent government, having been obtained by cable and mail censorship or other intelligence methods. If that be so, nothing that is likely to be found in the ship's papers will add to the available evidence, and the boarding in such case becomes an idle formality. In the laws

of war it is of the first importance that principles should not be subordinated to forms, and it is manifestly in the interest of the neutral vessel herself that she should not be delayed by needless formalities at sea.

If the reasoning which we have followed up to this point be correct, we are now in a position to envisage the role which aircraft, lawfully employed, can play in cutting off enemy trade in time of war. Let us assume, for example, that Great Britain is at war with a continental Power, and that the relevant trade routes pass, as they did in the last war, north and south of the British Isles. Trade control stations will then be established at certain ports, such as Falmouth or Lerwick, which lie close to the main traffic routes. In each of these ports there will be a capturing ship, having a sufficient number of aircraft at her disposal. These aircraft will carry out a daily patrol over a certain adjacent area, the radius of which will probably be measured by the maximum distance for which an aircraft can escort a merchant ship without undue waste of time. Beyond this radius commerce will have to be intercepted by ships at sea, but the efficient radius of action of each ship will be greatly enlarged if she is constructed to carry aircraft. In most cases the character of ships and their cargoes will be known to the Government before they reach the control area, so that visit at sea will be a superfluous formality, and the aircraft or the cruiser will order the ships into port for visit and search. In cases where such evidence is not available, the vessel must be visited at sea, and she can only be ordered into port if the boarding officer finds *prima facie* grounds for ordering her detention. The rest of the procedure will follow the practice established in the Great War.

This imaginary case is only put forward by way of illustration, since the details of operations must vary greatly according to the varying military and geographical conditions of different wars. In such a case as we have imagined it is clear that a belligerent having command of the sea will gain greatly from the legitimate use of air power, since he will be able to exercise effective control over a much larger area with a minimum use of naval force. The neutral will also be the gainer, in so far as the use of aircraft will expedite the examination of ships and cargoes by cutting down to a minimum procedure at sea. On the other hand, it may well be that a belligerent who does not command the sea will be under a strong temptation to conduct raids on commerce by shore-based aircraft acting independently of ships. Such craft can do nothing effective

unless they destroy merchant ships at sight, and the use of aircraft in this manner would therefore raise the same issue as was presented by the "unrestricted" German submarine campaign of 1917. It is to be hoped that any such challenge to the authority of the law of nations would again lead to neutral intervention. If principle is to be any guide to future practice, only one conclusion seems possible. The control of enemy commerce at sea is a maritime right which can only be exercised by ships, and aircraft may only take part in such operations as an integral part of the naval forces under the rules governing the right of capture at sea.

Note

A study of the following draft proposals submitted by the various delegations to The Hague Committee may serve to indicate the extent to which the maritime Powers were agreed upon the main question of principle.

British Draft: "The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, are to be deemed an established part of international law:

A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested."

American Draft: "Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft cannot divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft cannot capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested."

French Draft: "Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject."

The Italian delegation accepted the British draft, but proposed certain additions. After the first paragraph they proposed to add:

> "Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent state must pay compensation for the loss caused by the order to deviate."

And after the third paragraph:

> "If the merchant vessel is in the territorial waters of the enemy state and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing."

The American proposal was supported by the Japanese and the Netherlands delegations, but opposed by the British, French, and Italian. The British and Italian delegations were prepared to accept the French draft only if it were amplified in the way indicated by the British and Italian proposals. It was opposed by the other delegations.

RECENT NEUTRALITY LEGISLATION OF THE UNITED STATES

By PROFESSOR J. W. GARNER, Professor of Political Science in the University of Illinois

In consequence of the threatened outbreak of war between Italy and Ethiopia and the possibility that it might spread to Europe, Congress, responding to a widespread popular demand that legislation should be enacted which would enable the United States to avoid being drawn into the conflict, hastily passed on August 31, 1935, a joint resolution which was intended to accomplish this object.[1] It was recognized, however, that the question of a permanent neutrality policy required more thorough study than was possible in view of the approaching date which had been fixed for the adjournment of Congress. It was decided, therefore, to limit the duration of the embargo provisions of the resolution to February 29, 1936, with the expectation that the resolution would be replaced by a permanent and more thoroughly considered measure to be passed at the next session of Congress which was to meet in January 1936.

The resolution provided that

> "upon the outbreak or during the progress of war between or among two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the United States or possessions of the United States to any port of such belligerent states, or to any neutral port for transhipment to, or for the use of, a belligerent country."

This latter clause clearly recognized the doctrine of continuous voyage or ultimate destination against the application of which by Great Britain, it will be recalled, the Government of the United States protested during the World War. The resolution added that "the President, by proclamation, *shall* definitely enumerate the arms, ammunitions, or implements of war, the export of which is prohibited by this Act" and that "the President *may*, from time to time, by proclamation, extend such embargo . . . to other states as and when they may become involved in such war".

The resolution further provided that the President might, if

[1] The text of the resolution may be found in the *American Journal of International Law* for January 1936, p. 58 (Official Documents). See also *International Conciliation* for January 1936, which contains the text of the resolution, the proclamations issued by the President in pursuance thereof, and various public statements made by him.

in his judgment it would "serve to maintain peace between the United States and foreign nations or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States", proclaim the necessity of placing restrictions on the use of the ports and territorial waters of the United States by the submarines of a foreign nation, after which it should be unlawful for any such submarine to enter or depart from a port of the United States, except under such conditions, and subject to such limitations as he might prescribe. It will be recalled that during the World War the Government of the United States permitted German submarines, both commercial and war, to enter freely its ports and to depart therefrom, notwithstanding the protests of the Governments of Great Britain and France.

The resolution provided also that whenever the President should find that the maintenance of peace between the United States and foreign nations or the protection of the lives of citizens of the United States or the protection of its commercial interests or security required that American citizens should refrain from travelling as passengers on the vessels of any belligerent country, he should so proclaim and thereafter no citizen of the United States should travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President might prescribe. The purpose of this provision was to save the United States from becoming involved in such controversies as that which was precipitated with Germany on account of the torpedoing of the *Lusitania* and the drowning of 128 American citizens in May 1915. But American vessels manned by American crews and carrying American passengers were left free to navigate through maritime war zones and would be exposed to belligerent attack as they were during the World War.

It will be seen that the resolution contained both mandatory and discretionary provisions. Thus the proclamation by the President of an existing state of war was mandatory, although he was of course left free to exercise his judgment as to whether in a particular case a state of war existed and therefore to frame his own definition of the term "war". Since there is controversy among the jurists as to what constitutes a "state of war"[1] the discretion

[1] See McNair, "The Legal Meaning of War, and the Relation of War to Reprisals", *Transactions of the Grotius Society*, Vol. XI (1925), p. 1; Brierly, "International Law and Resort to Armed Force", *Cambridge Law Journal*, Vol. IV (1932), p. 308; Wright, "When does War exist?", *American Journal of International Law*, Vol. XXVI (1932), p. 362; and Fischer Williams in *Cambridge Law Journal*, Vol. V (1933), p. 1.

here left to the President might be of great importance in a particular case. Thus, while in fact he proclaimed (October 5, 1935) that a "state of war unhappily exists between Ethiopia and the Kingdom of Italy" he might conceivably at that time have held otherwise.

Having once proclaimed the existence of a state of war it was made mandatory on the President to enumerate by proclamation the particular articles which fall within the category of "arms, ammunition, or implements of war" which were prohibited by the resolution. But he was left with a certain discretion in determining what particular articles fall within this category. By his proclamation of October 5, 1935, he enumerated six categories of such articles, but the list included some which he might justifiably have omitted and it failed to mention others which could have appropriately been included. In short, the President might have proclaimed a more extended or a more restricted list. It has even been contended that he might have interpreted the term "implements of war" to include certain raw materials such as oil, copper, and cotton which are now essential to the carrying on of war.[1] But he did not do this, apparently because Senator Pittman, Chairman of the Senate Committee on Foreign Relations, had given the Senate a virtual pledge that this term would not be interpreted to include such materials.[2]

The resolution also conferred discretionary authority on the President in respect to the placing of an embargo on the exportation of arms, ammunition, or implements of war to other states than the original belligerents, which might later become involved in the war. Thus, if any one of the Members of the League of Nations should have become, prior to February 29, 1936, a belligerent in the present war between Italy and Ethiopia, the President would have been free to proclaim an embargo on such exports to such Member of the League or not, as he might have chosen. The fear of the isolationists that this discretion might be used by the President to discriminate between different belligerents with a view to assisting the League led to its withdrawal by the new joint resolution of February 19, 1936.

While the resolution evidently did not intend to authorize an embargo on essential war materials other than arms, ammunition, and implements of war, and while the President was not willing, for the reasons mentioned above, to interpret such materials as

[1] Buell, "The New American Neutrality", *Foreign Policy Reports*, January 15, 1936, p. 287.

[2] *Congressional Record*, 1935, Vol. LXXIX, p. 14907.

falling within the category of arms, ammunition, and implements of war, the Department of State used a certain moral pressure against the exporters of oil and other so-called key products to induce them to refrain from furnishing the belligerents with such supplies, but the appeals and pressure were not successful.[1]

The resolution was entirely silent in regard to an embargo on loans and credits to belligerents. So far as most European states are concerned, American loans to them were already unlawful under the so-called Johnson Act of April 13, 1934, which forbids the flotation in the United States of loans to states which are in default on the payment of their war debts to the United States. But there are some important states, Japan for example, which are not debarred by the Johnson Act from floating loans in the United States. Under the original neutrality resolution of August 31, 1935, it would not have been unlawful therefore for Americans to have made loans to such states for the purpose of enabling them to carry on war. But this situation was changed by the new resolution of 1936.

Shortly after the assembling of Congress in January 1936, consideration of new legislation to replace the resolution of August 31, 1935, was actively entered upon. Two bills were introduced in both Houses. One, the Pittman-McReynolds bill, better known as the "Administration" bill, sought to introduce a degree of flexibility into the embargo policy. It provided that embargoes or prohibitions should apply equally to all belligerents, unless Congress, with the approval of the President, should declare otherwise. Embargoes on arms might be applied at any time during the progress of a war. The bill authorized the President in his discretion to restrict the exportation to belligerents of essential war materials (oil, copper, &c.) to the pre-war peace-time level. It also provided for a mandatory embargo on loans and credits to belligerent states. Finally, it expressly reserved and reaffirmed the rights of the United States under international law as that law existed prior to August 1, 1914, except in so far as those rights were modified by the bill. The other measure, known as the Nye-Clark bill, which embodied the views of the isolationists, made embargoes applicable alike to all belligerents with no discretionary power anywhere to distinguish between belligerents for any reason.

[1] Since the League of Nations had not imposed an embargo on the exportation of oil to Italy and since in fact Italy obtained a supply from certain League states, American oil companies naturally felt that there was no reason why they should forgo a profitable trade with Italy when their competitors were not required to do so.

Embargoes were to be applied automatically upon the outbreak of war and not thereafter during the progress of the war. It proposed a "cash and carry" plan under which trade with belligerents in other articles than arms and munitions was to be permitted provided the transport was by belligerents on their own ships and at their own risk. It made no reference to the rights of the United States under international law as it existed prior to the World War. In other essential respects the two bills were alike.

The debates in Congress revealed some six different shades of opinion with little prospect of reconciliation. It was quite clear from the outset that the isolationists were in control of the situation and that all attempts to give the President some discretion in respect to the laying of embargoes would be defeated. They feared, or professed to fear, that the conferring of such power on him would be dangerous, since he might by distinguishing between belligerents, favouring one and discriminating against the other, cause the United States to become involved in the war, whereas the whole purpose of the proposed legislation was to insure that it would not be so drawn in. The fear that the President might co-operate with the League of Nations or allow his decisions to be influenced in some way by its policy undoubtedly also determined the attitude of a good many senators. The imposition of embargoes therefore must be mandatory and all belligerents, aggressors and their victims equally, must be treated alike. Considerations of morality and justice must not be allowed to enter into the question.

As the date for the expiration of the existing law drew near it became evident that if the Government insisted on the enactment of legislation embodying its own views, isolationists in the Senate would resort to a filibuster and the existing law would expire with no new legislation to take its place.

Under these circumstances the effort to enact a new law was abandoned and the final result was the prolongation of the life of the resolution of August 31, 1935, with some modifications and additions, for a period of fourteen months. The first of the changes introduced into the new law was the withdrawal from the President of the power which the existing resolution gave him to proclaim during the progress of a war the existence of a state of war. Apparently the proclamation must now issue as soon as the President finds that a state of war exists and not later on during the course of the war. Presumably this is to avoid the objection that if an embargo on arms were laid during the progress of a war

the neutral laying it might be charged with having changed the rules during the course of the war. Another change deprived the President of his discretion in respect to extending an embargo to other states which might become belligerents subsequent to the outbreak of war between the original belligerents. Under the resolution of 1935 the President had the power in his discretion not to forbid the exportation of arms to a state which subsequent to the outbreak of the war had been drawn into the war against its will and which was engaged in defending itself. But under the amended resolution of 1936 the President has been deprived of this discretion by the changing of the word "may" to "shall", so that it is now mandatory upon him to proclaim an embargo on shipments to such states regardless of the justice or injustice of the causes for which they are fighting.

Two new sections were added to the resolution of 1935. The first one prohibits the purchase, sale, or exchange of bonds or other securities of belligerent governments in the United States, although the President is empowered in his discretion to except from the operation of the rule ordinary commercial credits and short-time obligations in aid of legal transactions, if, in his opinion, such exception would serve to protect the commercial or other interests of the United States or its nationals. Under this provision, neither Canada nor China, for example, although not debarred by the Johnson Debt Defaulters Act, could borrow money in the United States for the purpose of enabling them to resist an unprovoked aggression on the part of another state. In this as in other respects all belligerents are to be treated exactly alike.

The other section declares that the provisions of the resolution shall not apply to an American republic engaged in war with a non-American state, unless the former happens to be co-operating with the latter in such war. This section is a part of the established policy of the Senate never to overlook an opportunity to get in a gesture in behalf of the Monroe doctrine both in the statutes and treaties to which its consent is necessary. It means that in case of a war, let us say between Great Britain and an American republic, an embargo would be laid on the exportation of arms to Great Britain, but not on exports to the American belligerent, even though the latter were the aggressor, which might conceivably be the case. Manifestly, this is discrimination which the European belligerent would be justified in regarding as an unneutral and unfriendly act, especially if the American belligerent were the aggressor. Considering that the avowed purpose of this legislation

is to enable the United States to preserve its neutrality in respect to all wars regardless of their character, location, or effect on the commercial interests of the United States, this discrimination is not easy to understand, for manifestly it provides for a policy which would not be strictly neutral, since it would involve furnishing the implements of war to a belligerent on one hemisphere while refusing them to his opponent on another hemisphere, even when the latter might be the victim of unprovoked aggression. The objection to the principle of discrimination as authorized by this section is that it is geographical rather than based on the character of the war. If the principle were applied generally to all wars in any or every part of the world where one of the belligerents was an aggressor and the other a victim of aggression, so that the former would be subject to an embargo whereas the latter would not be, it would be entirely defensible and would discourage wars of aggression.

The McReynolds bill proposed to give the President power to make such a distinction in applying the embargo provision, but the isolationists would not consent to it. The moral aspects of a policy under which an aggressor and his victim are treated alike do not appear to have made any impression upon them. The one desideratum which they sought to achieve was to keep the United States out of war regardless of whether the policy adopted might in a particular case be immoral or unjust. As the *New York Times* put it,

"it is proposed that we close our eyes to whatever moral issues may be involved; that we apply our embargoes on terms of absolute equality to the aggressor and his victim, to the tyrant and to the defenders of our own democratic tradition. This is not prudence or foresight. It is a counsel of cowardice and bankruptcy of American idealism."[1]

The proposal to authorize the laying of an embargo on certain so-called "key" raw materials, such as petroleum and copper, or the restriction of the exportation of such articles to the pre-war level, likewise failed to meet with the approval of a majority of Congress. It is not altogether improbable, however, that had the League of Nations acted more promptly in this matter, Congress might have decided to provide for such a restriction. As a result of the failure of Congress to do so, the exportation of oil and other essential war materials to Italy has proceeded without restriction and in greatly increased proportions. In these circumstances it is difficult to avoid the conclusion that instead of a policy of strict

[1] Issue of January 26, 1936.

impartiality and of non-participation in the existing war between Italy and Ethiopia, the United States is really pursuing a policy which is not impartial since it is permitting Italy to obtain in the United States the supplies which are necessary to enable her to continue the war against Ethiopia.[1] It is at the same time a policy which is resulting in the giving of aid and encouragement to that one of the belligerents which American public opinion regards as being an aggressor.[2] The resolution adopted by Congress has been criticized as a piece of stopgap legislation, half baked, and incomplete; as stated above it ignores all moral considerations and sacrifices the moral influence of the United States as a world power.[3] One of its principal defects is its inflexibility. By providing for a mandatory embargo with no discretion on the part of the President to make relaxations or variations in particular cases where justice, not to say the best interests of the United States, requires it, the neutrality policy of the United States has been encased in a plaster cast from which no deviations are permissible.[4] The President when signing the resolution of 1935 expressed doubt as to the wisdom of such a policy. He said: "History is filled with unforeseeable situations that call for some flexibility of action", and he added that "inflexible provisions . . . might have exactly the opposite effect from that which was intended. In other words, the inflexible provisions might drag us into war instead of keeping us out."[5] The Secretary of State, Mr. Hull, also pointed out the "difficulties inherent in any effort to lay down by legislative enactment inelastic rules or regulations to be applied to every situation that may arise".

The enactment of this legislation of course marks the abandon-

[1] Obviously also, an embargo policy the avowed purpose of which is to enable the United States to keep out of a war but which does not apply to essential raw materials, affords no guarantee that this object will be achieved, since American ships carrying such materials will be liable to search, condemnation, and possible sinking by belligerents.

[2] Compare the observations of P. M. Brown in a note entitled "Malevolent Neutrality" in the *American Journal of International Law* for January 1936, p. 89.

[3] Compare Fenwick, "Neutrality and Responsibility", in the *American Journal of International Law*, October 1935, p. 663; Jessup, "The New Neutrality Legislation", *ibid.*, p. 665; also his *Neutrality, Its History, Economics and Law* (1936), Ch. V.; Krock, in the *New York Times*, January 14, 1936; and an editorial on "Our Foreign Policy", *ibid.*, January 26, 1936. It was less satisfactory in several respects than the resolution of 1935 which Professor Jessup has characterized as "a hodgepodge of ideas scrambled together in the legislative frying pan in the closing days of a hot summer session in Washington".

[4] The objections to such a policy are well stated by Dulles and Armstrong in a recent book entitled *Can we be Neutral?* (New York, 1936).

[5] See his statement of August 31, 1935, quoted in Dulles and Armstrong, *op. cit.*, p. 150.

ment by the United States of its traditional policy in regard to the right of its citizens to engage in trade with belligcrents and for which it has fought two foreign wars. A well-known American journalist has remarked that the adoption of the new policy might very well have been followed by an apology to Great Britain for the War of 1812. In a statement issued by the President on October 5, after referring to the outbreak of the war between Italy and Ethiopia, he concluded with the following warning: "In these specific circumstances I desire it to be understood that any of our people who voluntarily engage in transactions *of any character* with either of the belligerents do so at their own risk."[1] If this pronouncement means what it seems to mean, it sounded the death knell of the old American doctrine of the freedom of the seas and the right of American citizens to the protection of their government in the exercise of what Jefferson and Wilson called an "inalienable" right to trade with belligerents.

While it was clearly the intention of the isolationists, whose influence was decisive in the determination of the character of the new legislation, to avoid giving the President any power to co-operate with the League of Nations in dealing with aggressors and in endeavouring to maintain a system of collective security, it would seem, nevertheless, that if American citizens who trade with belligerents hereafter must do so at their own risk and without the protection of their government, it may turn out that the League will be a beneficiary of this policy. Thus, if the League undertakes to blockade an aggressor state and in the enforcement of the blockade it should seize American cargoes destined for the ports of the aggressor, there will be no interference of the United States, if the principle "trade at your own risk" is followed.

It is to be hoped that the present temporary legislation, hastily passed on the eve of a presidential campaign, may be replaced next year by a permanent and more carefully considered law based upon more thorough study and preparation, when, as a clever American journalist remarks,[2] "realities may be faced by Congress, and straw-men taken out and burned", and who adds:

"Among the realities are these: 1. There is no such thing as neutrality in the modern world for a powerful state like this; and it is improbable that our interests would ever by served by it. 2. Policy cannot be legislated. 3. Dictators can only be checked by collective action. Among the straw-men is the figure of the League, or a group of European powers, as Moloch consuming 'our boys' the instant an American statesman confers collectively with keepers of the peace abroad."

[1] *International Conciliation*, January 1936, p. 57.

[2] *New York Times*, February 14, 1936.

THE COVENANT AS THE "HIGHER LAW"

By H. LAUTERPACHT, LL.D., Reader in Public International Law in the University of London

TREATIES, including the Covenant of the League, are, in principle, of equal status. Although fulfilling a variety of objects,[1] they are all contractual transactions based on agreement. The principal rules relating to the conditions of validity and the canons of construction are the same in various categories of treaties. They are not governed by any hierarchical order of importance or precedence attaching to any of them an overriding power by virtue either of their subject-matter or the number of their signatories. Some of them are frequently, for reasons of convenience, referred to as law-making or legislative, as distinguished from ordinary, treaties. These terms are adequate so long as it is borne in mind that they are used in a specific and metaphorical sense. There is no legislature in the international society; all treaties, whether bilateral or comprehensively multilateral, are law-making. That law-creating effect is, in terms of political importance, proportionate to the number of the signatories and the scope of the treaty. But it is in principle present in every treaty. All treaties constitute binding law. It follows that so long as they are in force they govern not only the conduct but also the contractual capacity of the parties; they prevent, in law, the effective rise of obligations inconsistent with their provisions. This, it will be submitted here, is a general principle of law to which international law forms no exception and which, for cogent reasons, obtains with special force in the international society.

However, in cases in which the contracting parties attach particular significance to a treaty there is nothing to prevent them from placing that general principle of law beyond doubt by endowing the treaty with express attributes of superiority, for so long as it is in force, over any other contractual obligation, present or future. An explicit provision of this nature hardly adds to the juridical effects of the treaty. But it lends emphasis and certainty to a rule which, while unimpeachable in legal logic and fully entitled to recognition in the relations of states, has not so far received sufficient clarification either in the practice of states or in the literature of international law. It appears that Article 20 of

[1] See McNair in this *Year Book*, 1930, pp. 100 *et seq.*

the Covenant of the League constitutes an enactment of this character. In the course of the application of sanctions against Italy during the war with Abyssinia that article grew considerably in stature. Events revealed some of its hitherto unexplored implications. This article is an attempt to assess their bearing on the more general question indicated in the title. For the sake of convenience Article 20 may be here reproduced *in toto*:

Article 20

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

Prior to September 1935, that article was seldom mentioned. It received little attention during the drafting of the Covenant; the principal question which weighed on the minds of the draftsmen seems to have been who will decide as to the alleged inconsistency.[1] Unlike most articles of the Covenant it has never been made the subject of a proposal for an amendment. Commentators, if they did not dismiss it either as a truism or as a statement of political views, have concentrated on technical questions of phrasing and divergencies between the English and French texts,[2] or on specific questions like the compatibility of treaties of alliance with the Covenant of the League.[3] But a number of questions arising out of the application of sanctions against Italy have helped to draw attention to the interpretation of that article as establishing the absolute primacy of the Covenant over any other treaty engagements of Members of the League *inter se* whether concluded prior or subsequent to the membership of the League, and, in some contingencies, over treaties concluded with non-Member states.

Some of these questions came before a legal sub-committee set up by the Co-ordinating Committee of the Assembly. The answers given by the sub-committee cover a wide range and are highly

[1] Hunter-Miller, *Drafting of the Covenant* (1928), Vol. II, pp. 279–81, 370–4, 380–4.

[2] See, e.g., Ray, *Commentaire du Pacte de la Société des Nations* (1930), pp. 569, 570.

[3] Schücking-Wehberg, *Die Satzung des Völkerbundes*, 2nd ed. (1924), pp. 667–9.

significant.[1] Thus they expressed the opinion that the application of sanctions suspended, as against nationals of the Covenant-breaking state, the operation of such treaties as those for the reciprocal enforcement of judgments "for the treaties could not override the effect of Article 16 of the Covenant, which constitutes the law by which the two states concerned are bound". They were, secondly, of the opinion that although the application of sanctions against Italy may prevent the execution of a commercial treaty with that state, Italy would "have no legal right to complain, since the situation so created would be the result of the provisions of the Covenant, which is legally binding on both Italy and the other state and prevails over the treaty in question"; neither, they thought, would Italy, bound as she was by the Covenant, be entitled to retaliate by refraining on her part from carrying out the treaty. Thirdly, they held that a treaty between two Members of the League obliging the parties not to participate in any international *entente* to prevent the purchase or sale of goods or provision of credits must be interpreted subject to Articles 16 and 20 of the Covenant with the effect that "application of sanctions by one of the contracting parties against the other is entirely legitimate, even if the treaty contains no reservation regarding the provisions of the Covenant or if one of the contracting parties was not a Member of the League of Nations at the moment when it concluded the treaty". Fourthly, they expressed the view that as the result of the obligation of mutual support as laid down in paragraph 3 of Article 16, it is in accordance with the spirit of that provision that Members of the League applying sanctions shall continue to benefit from the advantages of the most-favoured-nation clause in cases in which the application of sanctions against Italy has resulted in the suspension of advantages which were granted to Italy and which constituted the basis of the most-favoured-nation treatment accorded to other states. Fifthly, they were of the opinion that a state (which, apparently, is a Member of the League but does not participate in sanctions) is not entitled to invoke the benefits of a most-favoured-nation treaty in respect of special advantages accorded to a state applying sanctions. Finally, with regard to conventions concluded with states non-Members of the League, which contain provisions for freedom of communications, the sub-committee held that the latter cannot absolve a Member of the League from giving effect to its obligations under the Covenant. The committee declined to

[1] Doc. General 1935. 6. Co-ordination Committee 40. Also in *Official Journal*, Special Supplement, No. 145, pp. 21, 26.

say how far the obligations under the Covenant affected the rights of non-Member states. It seems that they envisaged the possibility of distinguishing in this respect between treaties concluded prior to the Covenant and those subsequent to it. It is clear, from the answer to this and other questions, that, in the view of the committee, the obligations of Article 16 were in any case of overriding effect as between Members of the League.

The views of the legal sub-committee are, in their cumulative effect, striking and unusually definite. This ought not to give cause for surprise. The answers were conceived not as a product of academic deliberation concerned with putting both sides of the difficulty, but as an aid to urgent international action of unprecedented significance. Nevertheless, these answers, it is submitted, constitute a sound interpretation of the letter and spirit of Article 20. The Co-ordinating Committee acted upon them. They were in effect invoked, in a number of cases, by States Members of the League confronted with complaints of governments adversely affected by the interpretation. Thus, for instance, the British Government seems to have relied upon the interpretation suggested in the replies of the sub-committee when, in January 1936, Hungary, a Member of the League who did not apply sanctions, demanded that Hungarian poultry should, having regard to a most-favoured-nation treaty with Great Britain, be granted Customs concessions accorded to Yugoslav imports. Great Britain rejected that demand on the ground that the special concessions allowed to Yugoslavia were conceded in pursuance of action under the Covenant.[1] When, in January 1936, Turkey, in reply to an inquiry by Great Britain, declared her readiness to comply with the obligations of mutual support under paragraph 3 of Article 16, Italy complained that the Turkish assurance was contrary to the Turco-Italian Treaty of Friendship of 1928. The Turkish answer to this complaint was based on the view that the admission of Turkey to membership of the League subsequent to the signature of the Treaty *ipso facto* subordinated to the Covenant all previous agreements.[2]

The principal obligation of Article 20 is in fact much more comprehensive than the abrogation of such treaties inconsistent with the Covenant as are in existence when the state concerned ratifies

[1] *The Times* newspaper, January 9, 1936. And see The Treaty of Peace (Covenant of the League of Nations) (No. 4) Order, 1935 (S.R. & O., No. 1248), reducing duty on certain Yugoslav goods by making an exception to the Import Duties Act, 1932.

[2] *The Times* newspaper, February 4, 1936.

its adhesion to the League. It applies to all treaties between Members of the League regardless of whether they were concluded before or after they became Members of the League. The express undertaking, in the concluding sentence of paragraph 1, not to conclude in the future treaties inconsistent with the Covenant is not a substantial addition to the principal provision of Article 20, except in so far as the conclusion of such treaties is made to constitute in itself a breach of the Covenant and a wrong involving the international responsibility of the state in question. But their invalidity or unenforceability results from the first, not the second, sentence of Article 20. Treaties concluded in breach of that undertaking are inoperative because "the Covenant is accepted as abrogating all obligations or undertakings *inter se* which are inconsistent with the terms thereof". The Covenant, like any other treaty, is the "higher law"; or, as the purist would have it, it is *the* law. The expression "abrogates" means in effect "is superior to"—now and for the future.

The answers of the legal sub-committee throw further light on what is meant by the term "inconsistent" as used in Article 20. It seems that inconsistency means not only patent inconsistency appearing on the face of the treaty—e.g. an offensive alliance or a treaty providing for the cession, without the consent of the Council, of mandated territory held by the contracting party, or an absolute promise of strict neutrality notwithstanding Article 16—but also what may be called potential or latent inconsistency. Such potential or latent inconsistency in relation to the Covenant may be concealed in an otherwise innocuous treaty of commerce or of extradition or for the enforcement of judgments or for the exchange of postal parcels. There is, on the face of it, nothing in such treaties which runs counter to the Covenant. But they may become inconsistent and therefore abrogated, as soon as it becomes clear that their continued validity or operation is incompatible with the negative or positive obligations of the Covenant. These positive obligations, in particular those under paragraphs 1 and 3 of Article 16, are such that their fulfilment cannot be reconciled with the continued operation of most treaties concluded with the state against which the action of the League is directed. These treaties are abrogated *pro tanto*, that is to say, for such time and to such an extent as may be required by the obligations of the Covenant. Article 20 is not a knife blunted by the cutting of the dead wood of inconsistent treaties in force when states enter the League. It is a perpetual source of legal energy possessed of a

dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members, whenever concluded. It is this latent inconsistency which is successfully attacked by the emphatic terms of Article 20, for treaties patently inconsistent with the Covenant would, without special provision, be caught by the more general rule of international law, discussed below, relating to treaties which are in terms contrary to former treaty obligations. So would, of course, even latent inconsistency. For, in strict logic, there is no difference in kind between the two. Latent inconsistency can be easily avoided by a safeguarding clause in some such terms as "Nothing in the present treaty shall be deemed to be inconsistent with or render illegal the fulfilment of the obligations laid down in or resulting from the Covenant". In fact a number of treaties concluded after 1919 provide that they apply only subject to the obligations of the Covenant.[1] Reservations of this nature hardly modify the legal position. With or without express proviso such treaties are subject to the obligations of the Covenant. However, Article 20 removes from the orbit of doubt a point of some nicety and difficulty.

The consequences of the construction here put forward may appear to be, so far as the Covenant is concerned, alarmingly wide. But they follow not because there is any hierarchical superiority about the Covenant as a legislative instrument—for there is none. Neither do they ensue for the mere reason that the Members of the League, not content to rely on general international law in the matter of inconsistency of treaties, have expressly endowed the Covenant with comprehensive overriding powers—for such caution is merely declaratory of existing principle. The grave consequences in the shape of possible incompatibility are the direct result of the comprehensiveness of the Covenant which not only limits the right of resort to war but also imposes most far-reaching obligations for the enforcement of the Covenant.

Finally, the answers of the jurists are suggestive as to the meaning of the last paragraph of Article 20. A distinction must here be drawn between treaties concluded with third states by a Member of the League prior to the fact of membership and those concluded subsequent to that event. With regard to the first, non-Members are not legally affected. Politically, their position is not as impregnable as might appear at first sight. For, as suggested by the legal sub-committee, the dilatory Members of the League, who

[1] For an enumeration of some of these treaties see Rousseau in *Revue Générale de Droit international public*, Vol. XXXIX (1932), pp. 140–2, 156–62, and Ray, *op. cit.*

have failed to secure release, may find themselves confronted with two conflicting obligations the choice between which must remain a matter of conjecture and uncertainty.

As to treaties which a Member concludes with third states subsequent to his entry into the League, the position is more complicated. The difficulty for the third states is no longer merely a political one. Undoubtedly the Covenant does not bind non-Members, and they cannot therefore be directly affected by any abrogation of treaties inconsistent with its terms. But they *are* affected by international law inasmuch as it generally invalidates treaties so inconsistent with previous treaties as to prejudice the interests of other co-signatories. When third states conclude a treaty with a Member State they know or ought to know that the latter has, by ratifying the Covenant, limited its contractual capacity to the extent both of not concluding treaties inconsistent with the Covenant and of not being bound by treaties in so far as they prove to be incompatible with the obligations of the Covenant in any given situation. For the obligation of Article 20 not to conclude treaties inconsistent with the Covenant applies both to treaties with Members and with non-Members. The third state has concluded a treaty with a state whose contractual capacity is limited. To the extent of that incapacity the treaty is inoperative. The third state may ignore the Covenant; it is not at liberty to ignore international law.

The interpretation of Article 20 here put forward proceeds on the view that treaties, other than those between the same contracting parties, which conflict with the provisions of previous treaties so as to cause injury to the interests of some of their signatories,[1] are, to the extent of such incompatibility, invalid and unenforceable before international courts. This principle, it is submitted, forms part of international law. It is regarded as such, in terms even wider than those suggested here, by positivist writers like Oppenheim,[2] Hall,[3] De Louter,[4] and others.[5] It is recognized, notwithstanding occasional departures, in the practice of states.[6]

[1] For the reasons for this qualification see the writer's note in this *Year Book*, 1935, p. 166, commenting on the Dissenting Opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case.

[2] Vol. I (4th ed. by McNair), p. 713. [3] *International Law* (6th ed., 1909), p. 334.

[4] *Droit International public positif*, Vol. I (1920), p. 480.

[5] See, e.g., Vattel, *Droit des gens*, Book II, Ch. 12, § 165. See, on the other hand, Wright in *American Journal of International Law*, Vol. XI (1917), pp. 576–9; Salvioli in *Rivista di diritto internazionale*, Vol. XII (1918), pp. 229–41; Rousseau, *loc. cit.*; and in particular, *Research in International Law. Treaties* (1935), pp. 1016–29.

[6] For a survey of cases and incidents see Tobin, *The Termination of Multilateral*

Great Britain has frequently appealed to it.[1] The so-called doctrine of non-recognition, recently revived[2] by the United States and the Assembly of the League in connexion with the Manchurian dispute, constitutes, upon analysis, a different formulation of the same principle. For non-recognition is not a purely political act; it is, in the absence of a court competent to adjudicate on the matter, an attitude expressive of a legal judgment to the effect that the new treaty is incompatible with the law as laid down in

Treaties (1933), pp. 206–49, who summarizes that practice as showing that "there is nowhere in the discussion a denial of its validity, and frequent affirmations of its existence" (at p. 217). In the case between Costa Rica and Nicaragua the Central American Court of Justice, while finding that the Bryan-Chamorro Treaty between the United States and Nicaragua violated the provisions of former treaties between Nicaragua and Costa Rica, refused to pronounce that treaty null and void for the merely jurisdictional reason that one of the parties, namely, the United States, was not a party to the dispute (*American Journal of International Law*, Vol. XI (1917), p. 228). See also, to the same effect, the decision of the same Court in the action brought *in pari materia* by Salvador against Nicaragua (*ibid.*, p. 729). But the Court found that Nicaragua "is under the obligation—availing itself of all possible means provided by international law—to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty . . . in so far as it relates to the matters considered in this section".

[1] See, in particular, the British protest, in 1846, against the Treaty between Russia, Prussia, and Austria providing for the annexation of Cracow. The protest was based on the ground that the Treaty was contrary to the provisions of the General Act of Vienna of 1815 (see Lord Palmerston's dispatch to Viscount Ponsonby of 23 November, 1846, *British and Foreign State Papers*, Vol. 35, p. 1085; and see *ibid.*, pp. 1042–1107, for the correspondence on the matter). See also the protest against the Preliminary Treaty of St. Stephano on account of its incompatibility with the Treaty of Paris of 1856 (Oppenheim, *loc. cit.*); and the British refusal, which was subsequently withdrawn, to recognize the validity of the Hay-Varilla Treaty between the United States and Panama inasmuch as it conflicted with the Hay-Pauncefote Treaty between the United States and Great Britain (*Diplomatic History of the Panama Canal*, U.S., Sen. Doc. No. 474, 63rd Congress, 2nd Session, pp. 81, 91). For a recent example of a painstaking effort to avoid what must be regarded as merely formal inconsistency between two international instruments, see the observations of the Swiss delegate to the Co-ordinating Committee questioning the propriety of including in the recommendation concerning the arms embargo against Italy the category of articles useful for chemical and incendiary warfare on the ground that such weapons were in any case forbidden "by the *jus gentium*, by the conscience of mankind, and by certain declarations to which all states had subscribed their names". In deference to these objections the Committee appended the following footnote to the relevant passage of the recommendation in question: "It should be observed that the utilization of these articles has been, and still is, prohibited under the Convention of June 17, 1925. These articles are only mentioned above because their manufacture being free (the more so, as in many instances they serve various purposes), the Committee desires to emphasize that the export of such products could in no circumstances be tolerated" (League of Nations, *Official Journal*, Special Supplement, No. 145, p. 20).

[2] A practically identical formula was used by the United States in 1915 in its communication to the Chinese and Japanese Governments concerning the Japanese demands presented to China: see McMurray, *Treaties and Agreements concerning China*, Vol. II (1921), p. 1236.

binding treaties and, therefore, legally non-existent. This absence of legal force in the inconsistent later undertakings, such inconsistency being known to both parties to the new agreement, is not a rule confined to international law. It is a general principle of law. The exact degree of its adoption in private law may be controversial, but the principle itself is not open to doubt.[1]

[1] As to English law, Sir Frederick Pollock (*Principles of Contract*, 9th ed., 1921, p. 475) lays down, without any qualification, the rule that if A makes a contract with B and then another contract with C which, *to the knowledge of both A and C*, is inconsistent with the first contract, then the second is void. (In the matter of international treaties such knowledge must be presumed, especially under a binding régime of registration as adopted in Article 18 of the Covenant.) Sir Frederick Pollock quotes no direct authority in support of this view and it seems difficult to find one, but its soundness, it is submitted, ought not lightly to be questioned. The illegality and voidance of the contract concluded in these circumstances may be asserted on various grounds. For C knowingly to conclude such a contract with A is in effect to induce him to break the contract with B. Such a contract, involving as it does interference with an existing contractual relation, is in itself a tortious act (*Quinn* v. *Leathem*, [1901] A.C. 495; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239). For the very making of the new contract may be an inducement to break the old one. A contract brought about in this manner falls under the rule avoiding contracts to commit a tort; the tort *in casu* is unlawful interference with an existing contract. Apart from this it is a clear rule that a contract cannot be valid if in order to prove it it is necessary to prove an immoral or illegal fact: Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, 348. The deliberate interference with an existing contractual relation is such a fact. Possibly such contracts might also fall under the rules avoiding contracts because of legal impossibility (*nemo dat quod non habet; nemo ad alium plus juris transferre potest quam ipse habet*—a reason which underlies the unenforceability of such contracts in Continental systems of law) or for reasons of public policy. There is a suggestive passage in the judgment of Buckley, L.J., in *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K.B. 310, at 357: "No doubt there are circumstances in which A is entitled to induce B to break a contract entered into by B with C. Thus for instance, if the contract between B and C is one which B could not make consistently with his preceding contractual obligations towards A, A may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it." It seems to follow that, if there was no lawful justification for inducing the breach of the first contract, then the assistance of the Court cannot be invoked to enforce the second. However, the writer has found no direct judicial authority supporting Sir Frederick Pollock's view, and the reasoning here adduced as an explanation of that view is therefore put forward with no little hesitation.

The fact that the Court, because of the circumstances of the case (as in contracts of personal service: *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 428), may refuse to grant an injunction restraining A, who is already bound by the same contract with B, from fulfilling the contract with C, does not necessarily mean that the Court will enforce that contract. It is one thing to say we cannot, in some cases, compel A not to fulfil a contract which he has unlawfully concluded; it is another thing to help A or C to enforce the contract which they made unlawfully in disregard of the pre-existing contract with B. With regard to the frequently quoted cases of *Lumley* v. *Gye* (1853), 2 E. Bl. 216, and *Lumley* v. *Wagner* (1 D.M. & G. 604), it may be asked whether Miss Wagner's contract with Gye, in addition to constituting a tort, at least on the part of the latter, was not in itself void and unenforceable. Could the court by injunction restrain Miss Wagner from singing elsewhere than at Lumley's theatre (*Lumley* v. *Wagner*)

In the international sphere the reasons for regarding later inconsistent treaties as void and unenforceable are even more cogent than in private law. It is, as a general rule, incompatible with the unity of the law for the courts to enforce mutually exclusive rules of conduct laid down in a treaty, a statute, or a contract. But among individuals contracts are infinite in variety and number; among states they are relatively few and a matter of general knowledge. The shock, therefore, resulting from any recognition of the later contract to the sentiment of the unity of the law is greater in the latter than in the former case. Moreover, in so far as there is any disposition by municipal courts to treat the later contract as subsisting, the logical exclusiveness of the subject-matter of the two contracts is mitigated by substituting the right to damages for the second inconsistent obligation. In the international sphere damages, by the very nature of things, are in most cases not likely to offer adequate compensation for the wrong. For these reasons it is difficult to accept the view that the treaties in question are valid and that the only effect of the inconsistency is that the obligations of the former treaty take priority over the conflicting provisions of the later agreement. This would be the position in any case. For, obviously, a state cannot lawfully terminate a treaty by the simple device of concluding another treaty inconsistent with the first. The flaw in the later treaty has an effect reaching beyond the mere reproduction of an obvious rule of international law. It makes that later treaty unlawful and incapable of enforcement.

This insistence on the nullity of the later treaty is not, it is submitted, mere pedantry. Treaties, woven into the structure of

and then proceed in an action on the contract to compel Miss Wagner to sing at Gye's theatre or to pay him damages for a breach of a contract which she had been restrained from performing for reasons of which Gye knew at the time when he made his contract?

Apart from the *dicta*, which are not quite clear, of Lord Holt in *Harrison* v. *Cage* (1698), 1 Ld. Raym. 386, and Hill J. in *Beachey* v. *Brown* (1800), E.B. & E. 796, there is no authority in support of the view that the inconsistent subsequent contract, when the inconsistency was known to the third party, is enforceable. See also the observations of Sir John Fischer Williams in *Transactions of the Grotius Society*, Vol. XVIII (1933), p. 122, and Smith, *Leading Cases* (13th ed., 1929), Vol. I, p. 432, whose authorities, however, do not in fact support the view that a contract is not illegal or void simply because private rights are interfered with, e.g., where the consideration is a breach of contract.

In German law the case here discussed seems to be covered by the provisions of Articles 138 (voidance of juristic acts which are *contra bonas mores*) and 826 (compensation for such acts) of the Civil Codes. For a survey of judicial decisions see Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (9th ed. by Loewenfeld and Riezler, 1925), Vol. I, p. 576, and Vol. II, Part III (1929), p. 1825.

customary international law, are the substance of the growing and changing law of nations. International law cannot recognize and it must actively discourage a state of affairs in which the law-creating faculty of states is abused for violating existing law as laid down in valid agreements. Governments cannot be permitted to discredit international law and to render it unreal by filling it with mutually exclusive obligations and by reducing treaties to conflicting makeshifts of political expediency. The necessity of discouraging such a state of affairs is so compelling that it is imperative to disregard the theoretical possibility of maintaining both treaties, for instance, when the injured contracting party fails to protest or when the offending state obtains release from the former treaty. States which deliberately choose to bind themselves to act in a manner contrary to obligations which they have undertaken, as well as states which induce such conduct, must know that the new treaty does not create a legal bond and that courts will refuse to enforce it. Jurists, it is believed, will be fulfilling a useful function by disclosing to the full these consequences of the law-making effects of treaties—of all treaties. They cannot by their own incantations conjure into existence a higher, legislative, type of international agreement. But they may help to reveal the far-reaching legal consequences common to all treaties.

The following summary of conclusions is submitted:

(*a*) The principal provision of Article 20 of the Covenant is essentially declaratory having regard to the rule of international law avoiding treaties, other than those between the same parties, conflicting with former treaty obligations of either of the parties.

(*b*) The same rule probably invalidates treaties of Members of the League with third states if such treaties are inconsistent with the obligations of the Covenant and are concluded after the state in question has become a Member of the League.

(*c*) The provisions of Article 20, although declaratory, are valuable inasmuch as they tend to remove doubts surrounding the application of a somewhat neglected principle of international law and to draw attention to the wide range of possible inconsistency with the comprehensive obligations of the Covenant.

(*d*) In particular, Article 20 brings into relief the fact that while the Covenant of the League is no more "law-making" than any other treaty, the substance of its law differs so radically from other international conventions in its scope and significance as a

purposeful instrument in the process of political integration of mankind as to deserve the designation of a "higher law".

(*e*) The rule postulating the invalidity of treaties conflicting with previous treaty obligations is a necessary deduction from the law-making effect of treaties in general and must be regarded as a beneficent principle calculated to enhance the authority of the law of nations and to safeguard its unity as a system of law.

MONISM AND DUALISM IN THE THEORY OF INTERNATIONAL LAW

By J. G. STARKE, B.C.L., Vinerian Law Scholar, Oxford; formerly Exhibitioner of the University of Western Australia

A STRICTLY theoretical treatment of the relation between international law and municipal law[1] is to-day of the utmost practical importance. While international law is developing at a pace without precedent in past centuries, there is some danger that the technique of its growth may be impaired by not giving a certain weight to theoretical considerations. The purpose of this article is to deal with the problem from an analytical, positivist point of view, and to some extent therefore it follows the principles of the Austrian school, Kelsen, Kunz, and Verdross.[2] This is not to say that the conclusions of that school are accepted without question; only their method is followed, and that method, it is submitted, represents their most decisive contribution to jurisprudence.

The Austrian school constantly employ the concept of the "norm",[3] and it would be well to clarify its meaning as we shall be employing it throughout the article. A norm shortly is a prescription enjoining a defined mode of action. A norm may be moral or it may be legal, but the legal norm differs from the moral by reason of its particular logical structure and its power validly to direct the human will. It is obvious that such a general concept is essential for an analytical treatment of law, and indeed it helps to simplify and purify theoretical method. Municipal law thus becomes a normative order or particular system of norms having validity over certain persons within a certain defined territorial area, while international law is a normative order of wider validity and operation.

The problem of the relation of these two normative orders is

[1] The terms "municipal law" and "state law" are used interchangeably throughout the article to denote the internal law of a self-governing state, and are intended as a translation of the more exact French expression, "droit interne".

The literature on the subject is formidable in quantity. A bibliography is given in Anzilotti, *Corso di Diritto Internazionale*, 1928 edition, at pp. 45–6.

[2] See for account of these principles: *Modern Theories of Law*, paper on Kelsen by Dr. Lauterpacht; "The Theoretical Basis of the Law of Nations", Dr. Kunz in *Transactions of the Grotius Society* (1924), p. 115; also *Revue de Droit International et de Législation Comparée* (1925), Dr. Kunz, especially pp. 558–60.

[3] See Morgenthau, *La Réalité des Normes*, for a critical account.

by no means modern, but it has been brought to the fore in recent times by the growth of modern constitutions and their necessary modification in order to function in an international society.[1] This interrelation is capable of endless illustration, but it will suffice for our purposes to take Article 49 (3) of the Danzig Constitution, which provides that constitutional alterations can only come into force after they have been submitted to the League of Nations and the League has not given voice to any objection. Obviously there is a certain connexion between the norm created by this provision in the Constitution, and the norms of international law which define the field of action of the League. Since the earliest times, theories explaining this relation have tended to answer certain specific questions. Are international law and municipal law concomitant aspects of the same juridical reality (monism), or are they quite distinct normative realities (dualism)? Which normative system stands higher in the legal hierarchy, international law or municipal law? Or are both of these questions meaningless, and is it more correct to say that international law is not law at all, so that the problem of its relation to municipal law does not arise?

Consistently with these questions there have been three theories: (*a*) international law is not law; (*b*) dualism; (*c*) monism; theories not free from deep-seated philosophic influences, and whose value it is impossible to estimate without some knowledge of their history and background.[2]

§ 1. *Origins of the Theories*

There is a curious tendency in English books on jurisprudence to treat the history of the theory of sovereignty as a form of introduction to the Austinian doctrines. This is to lose sight, however, of the fact that the history of sovereignty has had less to do with state supremacy than with the relationship of state law to another normative order whether natural law or international law. It is interesting to note that the early Catholic writers adopted a conception of state sovereignty which they were careful to reconcile with a monistic construction of law in general. For them, sove-

[1] See Mirkine-Guetzévitch *Droit International Constitutionnel*, and same writer "Droit International et Droit Constitutionnel", *Recueil des Cours de La Haye 1931*, Vol. IV, p. 310, for detailed illustrations of this modern tendency of constitutions.

[2] See Kunz, "Primauté du Droit des Gens" for a detailed history of theory on the relation between international law and state law. This paper is published in *Revue de D. I. et de Légis. Comp.* (1925); see especially pp. 568–77

reignty represented a delegation from a superior legal order, a competence rather than an omnipotence.

Thus, it was Suarez who wrote:

"In universo humano genere potuerunt iura gentium moribus introduci."

Even with Bodin, in 1576, we find expressed that notion of a higher legal order from which state sovereignty is derived.

"Sed legibus divinis aut naturalibus principes omnes ac populi aeque obligantur.... Quod igitur summum in Republica imperium legibus solutum diximus, *nihil ad divinas aut naturales leges pertinet.*"

Equally for the jurists of the natural law school, sovereignty represented no more than a competence given by international law, identified as part of the wider "ius naturae".

In the middle of the eighteenth century, however, legal theory underwent a profound modification which may be attributed to the influence of Vattel and Hegel. The conception adopted by these two men of the position of the state in the international community reflected their political convictions rather than any objective scientific standpoint, and the result was that when their doctrines spread, nothing did more to discourage the proper development of a scientific theory of international law. Thus, in 1758, Vattel wrote:

"Every sovereign state is free to determine for itself the obligations imposed upon it."

Some time later Hegel had carried the position farther by interpreting the state as a metaphysical reality with value and significance of its own, and by endowing it with the will to choose whether it should or should not respect law.

These teachings left lasting effects on the theory of international law. Even to-day, dualistic doctrine is deeply rooted in the Hegelian notion of the state-will, a notion whose persistence well illustrates the tenacity of unproved and irrational dogma. Jellinek, who championed the theory of auto-limitation,[1] and Zorn, who treated international law as external state law (*äusseres Staatsrecht*),[2] both to some extent shared the spiritual inspiration of Hegel. Traces of that influence survived among those who held fast to the view that the initial hypothesis, the *Ursprungsnorm*, at the basis of international law, is *pacta sunt servanda*.[3] In England, too, there was a noticeable transition from the Blackstonian

[1] Jellinek, *Allgemeine Staatslehre* (1900). [2] Zorn, *Grundzüge des Völkerrechts.*

[3] Anzilotti and Verdross both support this view, though Anzilotti upholds dualism and Verdross monism.

theory of the binding effect on Parliament of the Law of Nations, to the nineteenth-century doctrine of Parliament's unlimited sovereignty.[1] Yet the logical structure of the Austinian theory was vitiated by its reliance on a political interpretation of the state, for the Hegelian thesis, whether transformed into the doctrine of absolute sovereignty or the doctrine of auto-limitation, always appeared to lack a juridical foundation.

State sovereignty reached its doctrinal plenitude in the nineteenth century, and began to decline when jurisprudence came under the influence of scientific positivism and empiricism. The penetrating analyses of Kelsen[2] and Duguit[3] upset many time-worn notions, and the idea of sovereignty as omnipotence was one of the first to succumb. The Austrian school resolutely adopted monism as their creed, and their thesis was taken up by other thinkers in international law. The position to-day is that monism has obtained the widest theoretical acceptance, and the issue appears to lie between state monism and international monism. On this question, contemporary jurists are about equally divided.

§ 2. *Monism and Dualism*

Above, we have divided the theories into: (*a*) International law is not law. (*b*) Dualism. (*c*) Monism. The first theory lies outside the province of this article, and it will suffice to say that it is hardly taken seriously to-day. The fact that international law suffers from the lack of those organs and that procedure which makes state law so highly effective seems to be not an objection to its legal character, but a quality of its historical development.[4]

[1] *Triquet* v. *Bath* (1764), 3 Burr. 1478; *Blackstone Comm.* IVs. 67. The modern doctrine is stated by Cockburn C.J. in *R.* v. *Keyn* (1876), 2 Ex.D. 63.

See also Picciotto, *The Relation of International Law to the Law of England and America*, pp. 93–4, where the learned author accounts for the change in much the same way described above. He says that the case of *R.* v. *Keyn* "clearly rests on a different conception of the basis of international law. Where the basis of this was mainly moral and *a priori* speculation founded on what were held to be the rules of absolute right, it was obvious that international law must be part of the common law since the common law was held to rest upon such rules of morality and right. But when international law came to be conceived as the sum of practice and its reasoning to be *a priori* then it became necessary for English judges to introduce the element of assent. And for them the assent required is of the strictest sort."

[2] See Kelsen's *Hauptprobleme der Staatsrechtslehre*, 1911, which to a certain extent represents the programme of the Austrian school.

[3] *Traité du Droit Constitutionnel*, 2nd ed., Paris, 1921.

[4] Lauterpacht, *The Function of Law in the International Community*, pp. 399–405; Kelsen, *Recueil des Cours de La Haye*, Vol. XLII, pp. 124–37.

The other two theories call for more careful consideration.

(i)

Triepel and Anzilotti are the leading exponents of the dualistic construction. Triepel[1] treats the two systems of state law and international law as entirely distinct in nature. He contends first that they differ in the particular social relations they govern; state law deals with individuals, international law regulates the relations between states, who alone are subject to it. Secondly, he argues, their juridical origins are different; the source of municipal law is the will of the state itself, the source of international law is the common will (*Gemeinwille*) of states.

Let us take the first point, that international law only binds states. Kelsen[2] in a masterly discussion of the problem has neatly quashed the notion that the state is some peculiar metaphysical reality. Scientific analysis shows that the state as a legal concept is merely a schema serving to embrace the totality of legal norms which apply over certain persons within a defined territorial area; the state and the law may indeed be described as synonymous terms. The concept of the state is used to express in normative language legal facts in which individuals alone are concerned. For example, if a functionary violates a duty of international law, that tortious wrong may be ascribed to the state by a normative imputation,[3] but the obligation itself is one resting on an individual. The responsibility of a state is nothing more than a normative expression denoting that the collectivity of individuals constrained by a defined totality of legal norms are bound to make good the breach of a wrong which has been imputed to the state. The affirmation that international law binds states merely signifies that the individual who has violated the legal duty is not directly envisaged by a norm of international law, but that international law leaves the determination of that individual to state law.[4]

"Just as the execution or non-execution of these duties must take place through the action of individuals, so does the statement that international duties are the duties of the state simply amount to this, that it is an internal matter for the state alone to determine who are the individuals bound to fulfil these duties."[5]

[1] *Völkerrecht und Landesrecht* (1899). Also *Recueil*, Vol. I, p. 77.

[2] *Der soziologische und der juristische Staatsbegriff*, Tübingen, 1922. Also *Aperçu Général de la Théorie de l'État*, translated by Eisenmann.

[3] For the theory of Imputability see Anzilotti, *op. cit.*

[4] Kelsen, "Le Domaine de Validité du Droit International" in *Recueil des Cours de La Haye*, Vol. XLII, p. 121.

[5] Anzilotti, *op. cit.*

In this respect, therefore, there is no real distinction between state law and international law. In the ultimate analysis, international law binds individuals, but only mediately and through the state.

An interesting technical recognition of theory is contained in Article 4 of the Brussels Slavery Convention 1890.[1]

"The states exercising sovereign powers or protectorates in Africa may delegate to chartered companies all or part of the engagements that they assume in virtue of Article 3. *They remain nevertheless directly responsible* for the engagements that they contract by the present general act, and guarantee their execution."

The chartered companies thus rest under mediate obligations, but breaches of duty by their officers are *imputed* to the states who are ultimately directly responsible.

Criticism of Triepel's first contention can be carried a stage farther. International law is now gradually acquiring more and more immediate validity, and many of its norms not only directly determine the individuals bound by it, but also specifically prescribe the sanctions which those individuals incur. Of this direct operation of norms of international law, piracy and slavery are the best examples. The Brussels Slavery Convention 1890,[2] for instance, carefully defines the obligations and sanctions falling directly on those who take part in the slave trade. Section 3 of the unratified Convention on the use of Submarines and Poisonous Gas in time of War, concluded at Washington in 1922, also provides that an individual acting in breach of certain rules lays himself open to trial and punishment in any state in whose jurisdiction he may be, as if he has committed an act of piracy. On the strength of this provision, it may be objected that international law needs to be supplemented by the action of state organs, exercising their jurisdiction under the authority of norms of state law. This, however, does not prevent us recognizing that the state organs function then as organs of international law, and that the position is exactly the same as if a statute had laid down a general principle, and a subsequent regulation under the statute had prescribed the penalties or measures of execution.[3] The primary norms remain norms of international law, and individuals

[1] *Recueil Martens*, deuxième série, tome XVII, 1892, p. 345.

[2] The Brussels Slavery Convention is now superseded by the Convention of St. Germain 1919, which abrogates the Brussels Convention as between the signatories, and by the Geneva Slavery Convention 1926, under which the signatories undertake to prevent and suppress the trade, and bring about progressively its entire suppression in all its forms. The Brussels Convention, nevertheless, remains a valuable technical illustration of the theory of international law.

[3] Kelsen, *Recueil*, Vol. XLII, *op. cit.*

are none the less subject to them. Again, international law is more and more directly envisaging the individual as the object of its protection, and conferring on him specific rights and remedies available on his own motion. Article 64 of the Brussels Convention provides that

"any fugitive slave reaching the frontier of one of the states mentioned in Article 62 will be treated as free, and will have the right to claim a certificate of freedom from the competent authorities."

The individual thus becomes the subject of rights as well as obligations directly created by norms of international law.[1]

Triepel's second point, inspired as it is by the Hegelian thesis, naturally raises the question—what is meant by the will of the state? The truth is that the will of the state is a normative imputation to the state of a particular psychological quality implied from its acceptance of subjection to norms of international law. The will of the state is not an extra-judicial reality, but a technical expression for the fact that the state may become bound by international law. The concept draws its strength not from empirically justified theory, but from the political conviction that the state is an independent self-sufficient entity. Since it is always necessary to define the circumstances in which an act of the state legislature or other state organ will be treated as being a declaration of the will of the state, there must be some superior legal norm declaring when this act will bind the state as the expression of its will. Such act, for example ratification of a treaty, is only the condition on which the norm of international law becomes effective for the state. It is impossible for the will of the state to be the source of international law, since it presupposes a pre-existent rule defining when its expression subjects the state to international law.[2] The position is essentially the same with a collective declaration of state wills, which equally does not obviate the necessity for norms of superior validity. Triepel's *Gemeinwille* therefore does not reveal any true distinction between the norms of state law and the norms of international law.[3]

[1] See also sections 297 (*e*) and (*h*) of the Treaty of Versailles, 1919, for other examples of rights directly given to individuals by international law.

[2] Krabbe has dealt with this point in some detail in *Die Lehre von der Rechtssouveränität* and *Die moderne Staatsidee*.

[3] Lauterpacht, *op. cit.*, p. 416, points out that though Triepel's doctrine is based on the will of the states as expressed in the "Vereinbarung" or collective declaration of wills, it recognizes the authority of the law over the will of states. In a footnote he says that it is consequently impossible to accept Kelsen's view that Triepel's doctrine is merely a paraphrase of the auto-limitation theory.

Kelsen's criticism is, however, justified. Triepel's view is that the law created by

With Anzilotti the position is only slightly different. For him international law and state law equally constitute two distinct normative orders.

"The former are binding by reason of the principle 'pacta sunt servanda', and cannot be repealed except as laid down by international law. The latter are binding by reason of the rule which enjoins obedience to the legislature's prescriptions, and can only be repealed in the manner provided by the public law of the particular community concerned."[1]

The two systems, being based on different initial hypotheses, must be quite separate from one another.[2] There are obvious difficulties in accepting this thesis. Is it always true that the norms of international law may be traced back to *pacta sunt servanda*? Without resorting to artificial constructions such as "tacit consent", &c., it is difficult to fit customary international law into this schema. A further objection is that it is common for legal norms to bind states without any form of consent expressed by, or imputed to them. Thus, under the International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931, the states parties are under a general obligation not to exceed the estimates as furnished by them and finally determined by a body at Geneva, known as the Supervisory Body. The Supervisory Body also finally determines the estimates for non-parties and, although the Convention does not explicitly impose on non-parties the obligation not to exceed their estimates, non-parties are none the less liable to embargo proceedings if they exceed the estimates fixed for them by the Supervisory Body. The juridical result is that states are bound by a norm to which they have not expressly or impliedly consented. *Pacta sunt servanda* like the doctrine of state will is not self-explanatory, but a partial illustration of a much wider principle lying at the root of international law.[3]

The truth is that the whole dualistic position raises grave objections in principle. It seems to deny the juridical nature of international law by treating it as a kind of morality governing the relations between states and grounded only in their consent.

the "Vereinbarung" thereby becomes superior to the will of states. But he fails to recognize that the source of these norms is not the "Gemeinwille", but superior norms which give authority to the process of law-making by the "Vereinbarung".

[1] Anzilotti, *Corso di Diritto Internazionale*, Vol. I, p. 51.

[2] In Anzilotti's view, there is such a complete separation between the two systems that one system cannot contain binding norms emanating from the other. There can, again, be no possible conflicts between them, but only *renvois* from the one to the other.

[3] As to *pacta sunt servanda* see Lauterpacht, *op. cit.*, pp. 420–3.

Both Triepel and Anzilotti appear to reason much as if international law were natural law, as if its validity were independent of its legal nature. Logically, too, their thesis implies that the legal competence of the state is incapable of limitation save by the state itself. As Kelsen puts it, state egotism is substituted for legal pluralism. In the light of the monistic construction, these objections stand out more clearly.

(ii)

The leading adherent of monism is Kelsen.[1] For him, jurisprudence is a science, and the object of a science is formed by cognition and its unity. Unity of cognition connotes unity of object, and this unity must be found in the relation between municipal law and international law. Dualism is inconsistent with the axiomatic unity of a science. Any construction other than monism is bound to constitute a denial of the legal character of international law. There is no half-way house between monism and the theory that international law is not law. Two normative systems with binding force in the same field must form part of the same order. Nor is it a valid objection that law and morals are examples of two normative systems applying in the same field yet nevertheless different. The science of law deals only with binding norms. It aims at unity of normative knowledge which can only be expressed by the unity of a system of norms.

Having reached that conclusion, Kelsen turns to a structural analysis of the relation between state law and international law. It is here that his doctrine of "a hierarchy of norms" becomes of importance. For Kelsen the legal fabric is built up in a different way from the natural sciences; legal norms are only explicable by other norms from which they derive their existence and their binding force; thus, the norm laid down in regulations is determined by the norm in a statute, and it in its turn by a norm in the constitution, and so on. Law

"has the peculiarity of governing its own creation; a rule of law determines how another rule will be laid down; in this sense the latter depends on the former; it is this bond of dependence which links together the different elements of the legal order, which constitutes its principle of unity. The validity of a legal norm is based precisely on the norm which creates it; a norm is valid only if it conforms to the norm of superior force."[2]

From norm to norm, legal analysis eventually réaches one supreme

[1] *v.* "Rapports de Système entre le Droit Interne et le Droit International", *Recueil des Cours de La Haye*, Vol. XIV, p. 230.

[2] *Aperçu d'une Théorie Générale de l'État*, p. 26.

fundamental norm which is the source and foundation of all law. This fundamental norm is a necessary scientific hypothesis, a postulate of the science of law.

"The hypothesis itself is determined by the materials it must embrace, just as those materials are determined by the hypothesis. We have therefore the same correlation as between facts and hypothesis in the natural sciences." [1]

Farther than that hypothesis the jurist cannot venture, as the ultimate origins of law are determined by *metajuridical* considerations.

The question now arises, what hypothesis will best express the relation between the positive norms of state law and the positive norms of international law as pertaining to one unitary system of law. Is that hypothesis to be found in the state order, or is it to be found in the international order?

§ 3. *The Question of Primacy*

Primacy of state law or primacy of international law. Kelsen, in contrast with his colleagues of the monistic school, treats the choice of one or the other as a matter of ethics or politics rather than legal science. Provided that the logical consequences are strictly adhered to, he holds that the thesis of the superiority of state law is perfectly legitimate. The two theories, being no more than hypotheses, the choice cannot rest with juridical science.

"It cannot be asserted, as in the natural sciences, that the preferable hypothesis is the one which embraces the greatest number of given facts. For, here, we are not dealing with materials, with perceptible realities, but with rules of law—matter uncertain by its very nature; for in law, there is no objective necessity to envisage such and such element as a rule of law." [2]

It may be stated at once that Kelsen's idea of the possibility of a metajuridical option has not escaped criticism. Scelle[3] points out that Kelsen, having developed his thesis with meticulous logic, leaves us finally with an impression of insecurity. It is difficult to see how the choice of either system can avoid being based on strictly juridical considerations. Indeed, Kelsen himself admits that the choice depends in the last analysis on existing positive law. Kelsen's attitude seems to be, as Dr. Kunz says, rooted in his philosophy of scepticism and relativism. Kunz and Verdross, however, have refused to share his opinion, both taking the view that the only hypothesis scientifically possible is the primacy of international law.

Verdross raises one fundamental objection against the theoreti-

[1] *Allgemeine Staatslehre*, p. 104. [2] *Recueil des Cours de La Haye*, Vol. XIV, pp. 313–14.
[3] *Précis du Droit des Gens*, Tome I.

cal possibility of either hypothesis. If international law derives its validity from constitutional norms, then it must necessarily cease to be in force once the constitution from which it draws its authority disappears. But nothing is more certain than that the validity of international law is not merely dependent on change or abolition of constitutions or on revolutions, but continues to operate despite alterations in the state normative order.

It is true that Kelsen inclines to the primacy of international law for objective (and therefore scientific) reasons. He says that the two hypotheses are closely linked with the philosophical theories of knowledge; the difference between them lying in the difference between the objective and subjective conceptions of knowledge.[1] A subjective conception necessarily results in a denial of the existence of law and consequently of juridical science, for law exists only by reason of its objective validity. These statements are hard to reconcile with his notion of a metajuridical choice.

Yet no one has been more critical than Kelsen of the hypothesis of state primacy. In so far as it receives support to-day, that hypothesis bears testimony to the tenacious influence of the auto-limitation doctrine. We have criticized a more violent form of that doctrine above, but its weakness is no less obvious here. Since it simply amounts to the statement that only municipal law can bind the subjects and functionaries of a state, auto-limitation fails to explain how international law, a system external to state law, can bind them. Even treaties which, because of the element of assent involved, seem to give support to the thesis of state primacy, are really binding in virtue of those norms of international law which lay down that on ratification the treaty obligations become effective. Ratification is an act-condition authorized by an objective norm of international law, and the fact that it is also obligatory under the constitution of the state gives that provision force only as a declaratory statement of international law. Indeed, if the binding force of treaties rested solely on the constitution, it would follow that they cease to be obligatory if the constitution is changed. But treaties are regarded as binding no less after than before revolutions.[2]

[1] *Recueil des Cours de La Haye*, Vol. XIV.

[2] Cf. Declaration made at the London Conference of 1831, which decided that Belgium should be an independent and neutralized state and effected its separation from the Kingdom of the Netherlands. The relevant passage is contained in the Protocol of the Conference, dated February 19, 1831 (see *State Papers*, Vol. XVIII, 1830–1, p. 780):

"The deliberations of the Ministers have led them to recognize the necessity . . . of

Reduced to its lowest terms, the doctrine of state primacy is a denial of international law as law, and an affirmation of international anarchy. International law becomes merely that portion of the law of the state which governs its relations *vis-à-vis* other states. The juridical status of other countries in relation to a particular state is made to turn not on objective norms, but on a basic norm of that state order recognizing the existence of other states as normative systems. The thesis of state primacy thus raises fundamental inconsistencies of principle which in the last resort can only be reconciled by saying that international law as law does not exist.

The primacy of international law is the more scientific hypothesis because the more empirically justified. When we touch on such problems as the entry of new states into the international society, the disappearance of old states, and revolutions or transformations of legal orders, we are at crucial theoretical points. The generally accepted principles seem to be these. International law binds new states without their consent, and if consent is expressed, it is only declaratory of a juridical situation already in existence. Once the new state steps into the international community, it becomes subject to the norms which bind other members of that society, and accepts the obligations as well as the benefits of international organization. In the same way, once a revolution is successful, modification or transformation of the constitution proceeds within the ambit of norms of international law, these alterations to the internal legal order being in the ultimate resort based on the norm of international law that a successful revolution gives a title to alter the constitution. In the interim, international law continues to bind individuals and to create obligations for the new state once its existence is established *de facto*. The sole scientific construction justified on a consideration of these principles is that state law is conditioned by international law.

How far is the so-called sovereignty and independence of states affected? Positive law in the form of Article 15 (8) of the League Covenant seems to recognize a field quite outside the operation of international law:

"If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of *a matter which by international law is solely within*

recalling here the basic principle of public law, which is continually applied in the acts of the London Conference. *According to this fundamental principle, treaties do not lose their force despite internal constitutional changes.*" ("D'après ce principe d'un ordre supérieur, les traités ne perdent pas leur puissance quels que soient les changements qui interviennent dans l'organisation intéricure des Peuples.")

the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

According to the opinions of some, this article envisages a field in which the state has absolute liberty of action, which is free from rules laid down by international law. The truth, however, is that the exclusive competence of a state extends only to those matters as to which international law empowers the state to exercise unfettered discretion. This is confirmed by the express language of Article 15 (8) of the Covenant which speaks of matters left by international law to the domestic jurisdiction of the state.[1] The exclusive jurisdiction is incapable of precise definition at any moment, but it naturally depends on the development of international organization whether a wide or narrow discretion is given to states within the limits of international law. Thus, although it is true that questions of nationality fall within the exclusive domain,[2] this does not preclude the validity of a norm of international law authorizing states to legislate only in accordance with fair and reasonable standards. We are led back again to the earlier conception of the sovereignty of states—the special competence which they possess by virtue of international law.

§ 4. *The Theory of Functional Norms*

At this stage it is desirable to summarize the results of our inquiry. We have rejected dualism and ascertained that the only construction justified is that of monism. Writers have been divided between monism of the state order and monism of the international order, and an examination of the issue has shown that the latter view is more scientifically correct. There is one question that we have not yet considered. When we speak of the primacy of international law, do we mean all international law, or are we referring only to a special group of its norms? Here is a matter that calls for some discussion, and it may be suggested at the outset that the truer view is that we mean only the primacy of a specific part of international law. We shall begin by considering the analogy between international law and the legal system of the federal state.

The analogy is safe. The federal state is a perfect example of "normative hierarchy": from the fundamental norm that the

[1] As to the whole question see Politis in *Recueil*, 1925, Vol. VI, p. 43 *et seq.*; Castberg, *R.D.I.*, 1922, p. 135 *et seq.*; Brierly, "The Shortcomings of International Law", *B.Y.B.I.L.*, Vol. V. (1924), pp. 6 *et seq.*

[2] *Permanent Court of International Justice, Series B., No. 4*, p. 24.

constitution is to be obeyed radiate the federal and provincial norms that constitute the entire legal network. The federal legal order is monistic in character, and federal law conditions provincial law in the same way as international law conditions state law.

One necessary distinction in the federal system is that between federal constitutional law and federal law *simpliciter*. The connexion between the two is one of dependence, constitutional law embodying *inter alia* the various powers and authorities that sanction the process of federal law-making whether legislative or judicial. Now provincial law is in the same dependent position with respect to constitutional law as federal law. True, that the constitution may provide that federal legislation in certain matters is to prevail over inconsistent provincial legislation,[1] but within these limits provincial law and federal law stand exactly in the same dependent relation to constitutional law. True, again, that federal law has validity extending over a wider area, but *qua* dependence *vis-à-vis* the constitution, provincial law and federal law are on an equal footing. The federal legal order may therefore be described as a normative pyramid with constitutional law at the apex, and federal law and provincial law at each end of the base-line.

It would only be natural to expect the same arrangement to be reflected in the international legal order. International law accordingly consists of two types of norms:

(*a*) functional or constitutional norms;
(*b*) norms dependent on these;

a dichotomy identical with that considered above.

Analogy with federal law helps us to determine what are, and what are not, functional norms. For instance, one quality which federal law and international law have in common is the "mediacy" or indirect validity of their norms. Thus, it is a normal matter for federal legislation to vest in provincial courts federal jurisdiction with respect to its provisions, and these courts in exercising the jurisdiction act as federal organs. International law supplies fuller illustration of this mediate operation of legal norms, since to be effective it generally has to work through the organs of states empowered to act under its authority. Article 23 (*a*) of the League Covenant is a notable example:

"Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League:

[1] e.g. section 109 of the Constitution of Australia.

(*a*) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations."

The states members of the International Labour Organization, the institution set up to achieve this objective, exercise authority only as organs of international law.

The question now is, does this particular class of norms stand on the same footing as the functional norms of international law? The answer would appear to be in the negative. The true position is that there is a specific delegation of certain matters by virtue of a superior functional norm of international law. The same process is often reversed, state law itself delegating to international law authority in specific matters. As to federal systems, the position is clearly illustrated by the Constitution of Australia. Section 51 gives the Federal Parliament power to legislate "with respect to", *inter alia*:

"matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law" (pl. xxxvii).

And an illuminating example is provided by Article 23 of the League Covenant:

"Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League:

. . . . . .

(*d*) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of the traffic is necessary in the common interest."

The ultimate conclusion we are led to is that primacy in the monistic legal order pertains solely to the functional norms of international law, and it is there alone that Kelsen's initial hypothesis, his "Grundnorm" is to be found. These functional norms are reached *inductively* from the structure of the international community, and the shrinking legal competences of the states. The process is somewhat different from that in ordinary federal systems—the creation of a written constitution, which establishes the respective powers *inter se* of the federal state and the provinces. The international community is the result of a long historical growth, and it is natural for these functional norms to reflect that slow, empirical development. Something of this nature appears to be envisaged in the famous Judgment No. 10 of the Permanent

Court of International Justice (the *Lotus* case) which seems to accept the principle that the competences of states do not derive from international law, but that international law confines itself to limiting them in certain directions. At p. 18 the Court said:

"International law governs relations between independent states. The rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restriction upon the independence of states cannot therefore be presumed.*"

At p. 19 the Court also said:

"All that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."

These principles are, however, statements of historical fact rather than analyses of an existing juridical situation. Similar historical statements are perfectly appropriate as to almost any legal system, but legal theory in the realistic sense that we understand it can only concern itself with synoptic descriptions of present fact.

Theory has shown that international law to-day forms part of a legal hierarchy embracing numbers of normative systems united by their ultimate dependence on those functional norms which may well be termed the international constitution. It is in this constitution that the initial hypothesis or *Ursprungsnorm* of both international law and municipal law is to be sought. Juridical monism alone is consistent with empirical realities as well as logical and theoretical requirements. Monism may be regarded as conditioned by the sociological fact of a world growing more and more interconnected, so that it becomes clear that the individual really lies at the root of the unity of all law. Dr. Lauterpacht has well said:[1]

"It is true that international law is made for states, and not states for international law, but it is true only in the sense that the state is made for human beings and not human beings for the state."

This is a consideration which it is well to bear in mind, but it does not affect the thesis of this article—that international law and municipal law together constitute a normative order possessing an objective unity perceptible by methods of scientific analysis.

[1] Lauterpacht, *The Function of Law in the International Community*, p. 431.

THE CASE OF THE *I'M ALONE*

By G. G. FITZMAURICE

I. *History of the Case*

On March 22, 1929, the *I'm Alone*, a British schooner of Canadian registry, was sunk by the United States coastguard vessel *Dexter*, by gun-fire, at a point on the high seas more than 200 miles from the coast of the United States. The *I'm Alone*, a vessel engaged in the smuggling of alcoholic liquor into the United States, had originally been hailed by the United States coastguard vessel *Wolcott* at a point the exact location of which has never been determined, but which was admittedly beyond the limit of three miles from the coast of the United States. The *I'm Alone* had refused to stop or allow herself to be boarded, and had made out to sea with the *Wolcott* in pursuit. After the pursuit had lasted some two days, the *Wolcott* was joined by another United States coastguard vessel, the *Dexter*, by which the *I'm Alone* was actually sunk. The *Wolcott*, however, remained in the pursuit throughout. The sinking was not accidental, but was intentionally carried out on the ground that the *I'm Alone* refused to stop and allow herself to be boarded and searched. The vessel and her cargo, together with the personal effects of her captain and crew, became a total loss. The captain and crew were rescued by the coastguard vessel, with the exception of one man, who was drowned.

In sinking the *I'm Alone* the United States revenue vessels purported to be acting in the exercise of powers conferred on the United States by the so-called Liquor Convention, concluded with His Majesty The King in 1924.[1] The preamble to this Convention recited that the Parties were

"desirous of avoiding any difficulties which might arise between them in connexion with the laws in force in the United States on the subject of alcoholic beverages".

In the opening article the Parties declared their firm intention of upholding the three-mile limit as constituting the proper limits

[1] They were of course, from the standpoint of United States municipal law, also acting in the exercise of powers conferred upon them by that law. But this is not relevant in the present connexion, since the valid exercise, outside territorial waters, of the powers conferred by United States law depended, internationally, on the existence of the Convention.

of territorial waters.[1] Article 2, which is the principal article in the present connexion, read as follows:

"(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

The next article, article 3, conferred on British ships the right to carry under seal liquor in United States ports or waters, if part of the vessel's own stores or cargo is destined for a port foreign to the United States or its dependencies. Article 4, the last of the substantive articles of the Convention, read as follows:

"Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

"Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided."

[1] This article was probably included *ex abundanti cautelâ* and was in a sense superfluous, since the mere fact of concluding a convention for the purpose of providing for the exercise of certain powers on the high seas indicates that no right to exercise those powers would otherwise exist.

The sinking of the *I'm Alone* was followed by diplomatic correspondence[1] between the United States and Canadian[2] Governments, the latter claiming that the sinking of the *I'm Alone* was illegal and not justified by anything in the Convention. The two Governments being unable to agree, the matter was submitted to Joint Commissioners under article 4 of the Convention. The Commissioners were the Honourable Willis Van Devanter, Associate Justice of the United States Supreme Court, appointed by the United States Government, and the Right Honourable Sir Lyman Poore Duff, Chief Justice of the Supreme Court of Canada, appointed by the Canadian Government.

The case originally put forward by the Canadian Government before the Commissioners, and the United States reply thereto, may be summarized as follows. In the first place the Canadian Government contended that, at the time when the *I'm Alone* was originally sought to be boarded by the *Wolcott*, she was outside the conventional limits, i.e. the distance from the coast which she could cover in one hour, as provided in article 2 (3) of the Convention. In support of this, facts and testimony as to her position and speed were adduced. If this contention was correct, it would follow automatically that the initial attempt to board the *I'm Alone*, and *a fortiori* her pursuit and eventual sinking were *ipso facto* illegal. The United States contended in reply that the initial position of the *I'm Alone* was nearer the shore and within the conventional limits, and that her speed was much greater than the estimate given on the Canadian side. It was, however, common ground between the Parties that her initial position, whether inside or outside the conventional limits, was outside the three-mile limit of United States territorial waters affirmed in article 1 of the Convention.

In the second place, the Canadian Government contended that even assuming the *I'm Alone* was initially within conventional limits, yet, since she was admittedly outside territorial waters, there was no right to pursue her beyond the conventional limits. The right of "hot pursuit" conferred by the general rules

[1] The correspondence, together with the cases and written statements of both sides before the Commissioners, the decisions of the latter and all the important documents relating to the claim, are published by the Government of Canada in a volume entitled "Claim of British Ship *I'm Alone*" (Ottawa, J. O. Patenaude, 1935).

[2] The *I'm Alone* being of Canadian registry, the claim was conducted throughout by His Majesty's Government in the Dominion of Canada, who corresponded with the United States Government through the diplomatic representative of the Dominion at Washington.

of international law only applied where the pursuit began from within territorial waters. If there was any right of hot pursuit from a point within conventional, but outside the territorial waters limits, it must be conferred by the Convention itself—expressly or by necessary implication; and the Convention in fact conferred no such right. The Canadian Government further contended that the pursuit was not in any event "hot and continuous" pursuit, as required by international law, since the *I'm Alone* had eventually been sunk by a vessel which had only come up at a late stage, when the *I'm Alone* was far outside the conventional limits, and which had not started the pursuit or had any but a small share in it. In reply, the United States contended that under the general principles of international law conventional limits must be deemed to be assimilated to territorial waters for the purpose of applying the doctrine of hot pursuit. They further alleged that the right of hot pursuit from any point within the conventional limits was a necessary inference from the terms of the Convention itself, and that otherwise the rights purported to be conferred on the United States by the Convention would be largely illusory. On the question of the hot and continuous nature of the pursuit, the United States took the view that since the *Wolcott* was in pursuit throughout from start to finish, the continuous nature of the pursuit was not affected by the fact that the *Wolcott* was subsequently joined by another vessel by whom the actual sinking was carried out.

Finally, the Canadian Government contended that even assuming the pursuit of the *I'm Alone* to have been justified, the act of sinking her was illegal. The Convention gave the power to board, examine, search, and, in the last resort (and on certain conditions), arrest. By implication, those powers might carry with them the right to use a legitimate degree of force in order to achieve the ends in question. The sinking of the vessel was not, however, effected accidentally in the course of using legitimate force, but was intentional and deliberate. In reply, the United States contended that the right in the last resort to sink a vessel which refused to stop or to allow herself to be boarded, when hailed within the conventional limits, was a necessary implication from the terms of the Convention. Otherwise, all that a recalcitrant vessel need do when hailed within the conventional limits was to make off, and, provided her speed was sufficient, her pursuers would be helpless. The rights conferred on the United States under the Convention would in that event become largely illusory.

The whole fault in the present case lay in the refusal of the commander of the *I'm Alone* to stop when originally spoken.

The United States Government also advanced a further plea. The Canadian Government had based their claim on the fact that the *I'm Alone* was a vessel of Canadian registry, owned by a company incorporated in Canada. The United States, while admitting these facts, averred that the ultimate or beneficial ownership and control of the vessel was in the hands of United States citizens, who operated her for the express purpose of smuggling alcoholic liquor into the United States in contravention of local law. On account of the alleged circumstances of her ownership it was contended that the *I'm Alone* was not entitled to "be regarded as a British ship".

After a statement of claim and answer had been put in by the Parties, briefly reciting the facts and pleas as above, the Commissioners met and directed the attention of the Parties to three questions of law, which, they said, could be considered without taking evidence on the issues of fact. These questions were framed as follows:

"The first question is whether the Commissioners may inquire into the beneficial or ultimate ownership of the *I'm Alone* or of the shares of the corporation that owned the ship. If the Commissioners are authorized to make this inquiry, a further question arises as to the effect of indirect ownership and control by citizens of the United States upon the claim; viz. whether it would be an answer to the claim under the Convention, or whether it would go to mitigation of damages, or whether it would merely be a circumstance that should actuate the claimant Government in refraining from pressing the claim, in whole or in part.

"The second question relates to the right of hot pursuit. Further, it has two aspects, and it is based upon the assumption that the averments in the Answer with regard to the location and speed of the *I'm Alone* are true. The question in its first aspect is whether the Government of the United States under the Convention has the right of hot pursuit where the offending vessel is within an hour's sailing distance of the shore at the commencement of the hot pursuit and beyond the distance at its termination. The question in its second aspect is whether the Government of the United States has the right of hot pursuit of a vessel when the pursuit commenced within the distance of twelve miles established by the revenue laws of the United States and was terminated on the high seas beyond that distance.

"The third question is based upon the assumption that the United States Government had the right of hot pursuit in the circumstances and was entitled to exercise the rights under article 2 of the Convention at the time when the *Dexter* joined the *Wolcott* in the pursuit of the *I'm Alone*. It is also based upon the assumption that the averments set forth in paragraph 8 of the Answer are true. The question is whether, in the circumstances, the Government of the United States was legally justified in sinking the *I'm Alone*."

On these questions the Parties were asked to submit written reasoned briefs. In the briefs which were accordingly submitted, the arguments of both sides on the second and third questions were further developed on the lines already noticed. The first question referred to a matter which had up till then only been dealt with cursorily, and on this subject the briefs developed the Parties' arguments in full for the first time. Briefly, the Canadian Government contended that the Commissioners could not inquire into the ultimate or beneficial ownership of the *I'm Alone* at all. The vessel was unquestionably a vessel of Canadian registry, flying the British flag, and owned by a Canadian company. Article 4 of the Convention specifically stated that "Any claim by a British vessel" might be referred to the Joint Commissioners, and no exception was made on the ground of the ultimate or beneficial "ownership" of the vessel. It was true that the Commissioners were empowered to make "recommendations" to the governments concerned, but they could only make recommendations on the issue actually submitted to them, viz. the merits of the claim of a British ship. They had no jurisdiction to make recommendations on a matter extraneous to the claim itself such as the question whether, even given the indubitable *de jure* British nationality of the vessel, the claim ought to be pressed or pursued further by the claimant Government. If the view were to prevail that claims in respect of British ships could not be brought if it appeared that the ultimate control of the vessel was not in British hands, the Convention could be violated with impunity every time it appeared that such was the position, notwithstanding the fact that the vessel was unquestionably British, and properly flew the British flag.

In reply to this, the United States submitted that on the true construction of article 4 of the Convention, the functions of the Commissioners were different from and wider than those which would attach to a court proper, or to arbitrators. The Commissioners, according to the United States view, were not limited to giving a decision on purely legal grounds. Their function was to make recommendations, and, in effect, to advise the governments concerned as to the course they ought to take to settle the dispute, having regard to the equities as well as to the legal rights of the matter. They were not precluded, therefore, from inquiring into the question of the ultimate or beneficial ownership of the vessel; and if they found that the ostensible owners were merely puppets screening the true owners, who were

United States citizens engaged in breaking United States law, so that any damages awarded would find their way into the pockets of these persons, it would be proper for the Commissioners to recommend that the Canadian Government should not further press the claim.

After considering the respective briefs, and hearing oral argument, the Commissioners issued a joint interim report to the following effect (for the sake of convenience the order in which the Commissioners gave their conclusions has been altered). On the third of the three questions which they had propounded (viz. the propriety of sinking the vessel) the Commissioners expressed the opinion that—

"On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph 8 of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention."

On the second question, that of hot pursuit from within conventional but not territorial waters, the Commissioners stated that they were not yet in agreement, nor had they reached disagreement. It will be observed, however, that the Commissioners' answer to the third question made it unnecessary to decide the second one; for even if it should be assumed in favour of the United States that the right of hot pursuit existed in the circumstances, the sinking of the vessel would still be contrary to the Convention. In point of fact the Commissioners did not deal further with, or hear any more argument on the question of hot pursuit, nor did they make any reference to it in their final report. The conclusion must be, therefore, especially in view of their express statement of inability to agree on the subject, that the Commissioners did not decide the point one way or the other.[1]

[1] With very great respect the present writer is unable to agree with the view suggested in a note written by Professor Garner in the *British Year Book of International Law* for 1935 to the effect that the Commissioners' opinion "appears to have assumed that the United States was justified in exercising the right of hot pursuit in the circumstances mentioned, that is, beyond the three-mile limit, so long as it was begun within that zone. It appears also to have been the *intentional* sinking of the *I'm Alone* that was held unjustifiable; had it been sunk as an incident of the exercise of hot pursuit the sinking would not have been unjustifiable." In the present writer's view, it was only for the purpose of deciding the question of the legality of the sinking that the Commissioners assumed that the United States were justified in carrying out the hot

The Commissioners' conclusion on the third question also made it unnecessary to determine the initial position of the *I'm Alone*, and whether she was within or without the conventional limits when first spoken by the *Wolcott*; for even if she was within those limits (and even if her subsequent pursuit was justified) her eventual sinking was illegal. The question of the vessel's initial position was not further argued therefore, and was never decided.

There remained the first question, that of the beneficial ownership of the *I'm Alone*. On this the Commissioners expressed themselves as follows:

> "The Commissioners think they may inquire into the beneficial or ultimate ownership of the *I'm Alone* and of the shares of the corporation owning the ship; as well as into the management and control of the ship and the venture in which it was engaged; and that this may be done as a basis for considering the recommendations which they shall make. But the Commissioners reserve for further consideration the extent to which, if at all, the facts of such ownership, management, and control may affect particular branches or phases of the claim presented."

In consequence of this last finding, the Commissioners recommended the two governments to instruct their agents to submit to the Commissioners, in the first place statements setting forth their contentions as to where the ultimate and beneficial ownership of the *I'm Alone* lay, together with the evidence in support thereof; and in the second place statements itemizing the sums which should be payable by the United States Government by way of damages, in case the Commissioners should determine that compensation was payable by that government.

Statements were accordingly submitted, and there was a hearing before the Commissioners at which witnesses were examined and oral argument was addressed by the agents on both sides. The United States contention on the issue of ownership was, briefly, that although the vessel was of Canadian registry and although her legal or apparent ownership lay in a Canadian

pursuit; for it was only on this assumption that the question of the legality of the sinking arose at all. If the right of hot pursuit did not exist in the circumstances, then it would have followed automatically that the whole pursuit, and *a fortiori*, the sinking, was illegal. As the Commissioners were not able to agree on the question of the propriety of the hot pursuit, but *were* able to agree that the sinking was in any event illegal, they based their decision on this ground, which made a decision on the other unnecessary.

Professor Garner's further suggestion that the Commissioners' decision as to the illegality of the sinking was based solely on the *intentional* nature of the sinking, also raises a difficult point, owing to the Commissioners' use of the phrase "necessary *and* reasonable". This is discussed on p. 99 below.

Company, the shareholding of which was also Canadian, the shareholders, and the Company, in fact held as "trustees" for United States citizens, from whom the purchase money for the vessel had come and in whom lay her beneficial ownership and effective control. Evidence was adduced to show that the vessel in fact took her orders from the United States, not Canada, and that United States citizens controlled her movements and activities. It was accordingly contended that any damages awarded in respect of the value of the vessel and her cargo (which consisted almost entirely of alcoholic liquor) would in fact find their way into the pockets of United States citizens, and it was pleaded that it would be unjust to compel the United States to pay damages, as the result of an international claim, when those damages would only redound to the benefit, not of the claimant's citizens, but of the defendant Government's own nationals who, in the transaction out of which the claim arose, had been engaged in a flagrant attempt to break United States law. Without prejudice, therefore, to the question what, if any, damages were payable under other heads, it was contended that none should be payable in respect of the value of the vessel herself or her cargo.

On the Canadian side, it was contended that the evidence adduced by the United States in order to show that the beneficial ownership of the vessel lay in United States hands was not sufficient[1] to overcome the natural presumption arising from the fact of the vessel's Canadian registry, in the name of a Canadian Company, the shares of which were in Canadian hands, that the beneficial ownership was the same as the legal ownership.

The Canadian Government also pointed out that under the relevant provisions of the Merchant Shipping Act, 1894, a British ship could only be owned by British subjects or companies. Careful inquiries, they said, were always made prior to registration, to ascertain that this requirement was complied with. Moreover, if it subsequently appeared that a vessel registered as British was in fact owned in whole or in part by aliens, the ship herself or the alien interest in her became liable to forfeiture. On the basis of this latter provision of the Act the following argument was advanced:

"It is necessary, however, to point out again, that under the laws in force in Canada, no United States interests could obtain a proprietary interest in the

[1] There was much argument as to the credibility, weight, and effect of the evidence, but for the purposes of this article it is assumed that, as the Commissioners found, the facts were as alleged by the United States.

I'm Alone. Incontrovertible evidence as to the existence of a trust would merely establish, conclusively, that the ship was subject to forfeiture and that, consequently, beneficial interest in the ship was in the Crown, in right of the Dominion of Canada—and not in Mr. Hearn and his associates on the one hand; or the supposed United States beneficiaries on the other. The position would then be that a ship, in which the legal title was vested in a Canadian corporation but in which the only realizable interest was in the Crown in right of the Dominion of Canada, had been unlawfully sunk by the *Dexter*."

The Canadian Government therefore claimed damages in respect of the value of the vessel and her cargo. Damages were also claimed in respect of the loss and injury suffered by or in respect of members of the crew. The total claim, in United States currency, amounted to nearly $400,000.

Two further points came up during the oral hearing. The United States showed a disposition to contend that the claim was one which ought not to have been brought at all, because the vessel was admittedly a malefactor, engaged on the occasion in question in an attempt to break United States law. This plea became inextricably involved with the analogous, though technically quite independent, plea that the claim ought not to have been brought (or at any rate was not entitled to succeed so far as certain heads of damage were concerned) because it was really for the benefit of United States, not Canadian citizens.

The other point concerned the nationality of certain members of the crew. Some were French subjects, while among the British subjects there were some of United Kingdom, not Canadian origin. The United States contention was that the Canadian Government, in setting out the heads of damage as recommended by the Commissioners, were not entitled to include claims in respect of persons who were not Canadian citizens. This contention was based on the grounds first, that a government can only put forward a claim on behalf of its own nationals; and secondly, that the United States would have no guarantee that the payment of damages to the Canadian Government in respect of these persons would be regarded by the latter's governments as a good discharge of any claim those governments might consider that they themselves had in the matter.

The Canadian answer on this point was, as regards the individuals of French nationality, that the claim was not on behalf of any individual as such; it arose out of damage to a vessel of Canadian registry, and the damages in question were simply part of the damages resulting from her illegal sinking. There was also a plea that where a claim was on behalf of a vessel, members

of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel.

In regard to the British members of the crew who were not Canadian citizens, the Canadian Government took a different line. The vessel was a British vessel, and the persons concerned were indubitably British subjects. The Canadian Government had the right to put forward a claim on behalf of any British subject. If there was any question as to which of His Majesty's Governments should most appropriately put forward a claim on behalf of a British subject, that was a matter for domestic settlement between those of His Majesty's Governments concerned, and could not form the subject of a decision by an international tribunal. In brief, the argument was that no international tribunal was entitled to look behind the fact of British nationality, with the object of differentiating between British subjects of different origin or local citizenship within the Empire.[1]

On January 5, 1935, the Commissioners issued their final report. After recapitulating the conclusions reached in the interim report they proceeded as follows:

"It will be recalled that the *I'm Alone* was sunk on the 22nd day of March

[1] The Canadian Agent read out before the Commissioners a letter on this subject addressed to him by His Majesty's Ambassador at Washington, based on instructions from the Government of the United Kingdom. The letter was as follows:

"I understand that in the course of proceedings in the *I'm Alone* case, the Agent of the United States Government has intimated his intention to question your authority to present claims on behalf of two members of the crew called Eddie Young and William Wordsworth, both of whom are British subjects, on the ground that they are not in any sense Canadian citizens.

"I have the honour, on instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that in the view of His Majesty's Government in the United Kingdom, the question as to which of His Majesty's Governments should present a claim on behalf of an individual subject of His Majesty is one for settlement between the Governments of His Majesty concerned; and that no foreign Government is entitled to question the authority of one of His Majesty's Governments to present a claim on behalf of a particular subject of His Majesty. In the present case it has throughout been considered convenient that all claims by British subjects in connexion with the *I'm Alone* case should be disposed of through machinery instituted for disposing of claims put forward by His Majesty's Government in Canada, and, so far as His Majesty's Government in the United Kingdom are concerned, you have full authority to present claims on behalf of the two individuals in question. I may add that such final disposition of the claims made on behalf of the two individuals in question as may be reached under the procedure which has been adopted by His Majesty's Government in Canada and the United States Government for dealing with the *I'm Alone* case, will naturally be regarded by His Majesty's Government in the United Kingdom as constituting a final settlement of any claims which might be made in this connexion on behalf of the two individuals.

"You are of course at liberty to make such use as you may think fit of this letter in the course of proceedings before the Commission."

1929, on the high seas, in the Gulf of Mexico, by the United States revenue cutter *Dexter*. By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention. The Commissioners now add that it could not be justified by any principle of international law.

"The vessel was a British ship of Canadian registry; after her construction she was employed for several years in rum running, the cargo being destined for illegal introduction into, and sale in, the United States. In December 1928, and during the early months of 1929, down to the sinking of the vessel on the 22nd day of March, of that year, she was engaged in carrying liquor from Belize, in British Honduras, to an agreed point or points in the Gulf of Mexico, in convenient proximity to the coast of Louisiana, where the liquor was taken from her in smaller craft, smuggled into the United States, and sold there.

"We find as a fact that, from September 1928, down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned. The possibility that one of the group may not have been of United States nationality we regard as of no importance in the circumstances of this case.

"The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.

"The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.

"The Commissioners have had under consideration the compensation which ought to be paid by the United States to His Majesty's Canadian Government for the benefit of the captain and members of the crew, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there. [The Commissioners then recommended that compensation as mentioned below should be paid in respect of the captain and crew.]"

The effect of this report was to reaffirm the Commissioners' previous conclusion that the act of sinking the vessel was illegal. To their former observation that it was not justified by anything in the Convention, the Commissioners added that it was not justified by any principle of international law. The question of the propriety of the hot pursuit, as such, remained undecided.[1] Due regard was paid to the fact that the vessel was a British vessel of

[1] So also in consequence did the question whether the pursuit could be regarded as hot and continuous or rather whether the sinking was the outcome of such a pursuit, seeing that the vessel which actually sank the *I'm Alone* had not commenced the pursuit but had joined in it at a later stage. Considerations of space prevent the discussion of this question here.

Canadian registry, in that the view was expressed that the United States Government ought to apologize to the Canadian Government and pay to them the sum of $25,000 (presumably as compensation for the injury to British sovereignty); and compensation to a little over the same sum was recommended to be paid to the Canadian Government for the benefit of the captain and crew, irrespective of nationality, "none of whom was a party to the illegal conspiracy to smuggle liquor into the United States and sell the same there".[1] On the other hand, no damages were recommended to be paid in respect of the value of the vessel herself or her cargo, on the ground that the *de facto* ownership and control of these lay in the hands of United States citizens "who employed her [i.e. the vessel] for the purposes mentioned [i.e. smuggling into the United States]".[1]

II. *Nature of the Commissioners' Functions*

Before attempting any appreciation of the Commissioners' reports, it is desirable to reach a conclusion as to the capacity in which the Commissioners were acting. Were they acting as judges, and purporting to give a judicial decision based on legal grounds; or were they, on the other hand, acting rather in the capacity of counsellors appointed to advise the two governments, and purporting to make recommendations on a broad basis of equity with the object of promoting a settlement of the dispute? The view that their functions were those of advisers rather than judges was indeed strongly urged upon them by the United States Government, who suggested in consequence that equitable considerations should not be excluded from their conclusions; but the Commissioners did not themselves in their reports give any express indication of the capacity in which they conceived themselves to be acting.

It seems reasonably clear, however, that the Commissioners cannot be regarded as having intended to give a strictly legal decision. Indeed, they did not give a "decision", as such, at all. What they did was to propound certain questions to which they then gave "answers". These "answers" were embodied, not in a judgment but in a "report". Further, as a consequence of the "answers" which the Commissioners gave, they proceeded to make "recom-

[1] Particular attention should be paid to both these passages for they suggest strongly that, in part at least, the reason for the refusal to recommend the payment of damages in respect of vessel and cargo lay less in any non-British *de facto* ownership than in the fact that the vessel was employed for an illegitimate purpose.

mendations" as to what should be done by the parties, and they "recommended", *inter alia*, that damages should be paid under certain heads, instead of directing or finding that this should be done, as is customary in a judgment proper.

The Commissioners made no attempt to give a reasoned decision of the ordinary kind, indeed, gave virtually no reasons at all for their conclusions. This is understandable if they were simply purporting to make recommendations *ex aequo et bono* and to state what they considered had best be done by the parties in order to achieve a satisfactory settlement, but it is inconsistent with the view that they were purporting to give a decision on a strictly legal basis. The absence of reasons is particularly noticeable with reference to the Commissioners' conclusion that they were entitled to look behind the *de jure* ownership of the vessel, and also with reference to their further conclusion that the *de facto* United States ownership of the vessel disentitled the Canadian Government from recovering damages representing the value of the vessel herself and her cargo, since both matters are of a highly controversial nature.

III. *The Sinking of the Vessel and the Question of Hot Pursuit*

The first of these questions formed the subject of one of the Commissioners' conclusions, but not the second, which was expressly left open. It will nevertheless be convenient to consider them together, because the issues raised by both points are very similar; and the best method of approach would seem to be to consider how the United States Government put their case and how far their arguments were valid.

The United States case was based on two grounds. In the first place it was contended that the right of hot pursuit from within conventional limits,[1] and the right in the last resort to sink a vessel intentionally rather than let her escape, were implicit in the Convention and were necessary inferences from the terms of the latter, without which the rights alleged to be conferred on the United States would be illusory. Secondly, it was contended in effect that conventional limits must be assimilated to territorial waters for both purposes, and that if a country, e.g. the United States, had a right of hot pursuit from within territorial waters, and a right in the last resort to sink an offending vessel there, then by a process of natural and logical extension that

[1] Throughout this discussion it will be assumed that the vessel pursued was within conventional limits but outside the limits of territorial waters at the time when the pursuit commenced.

country must be deemed to have the same rights in regard to cases arising under a convention such as the Liquor Convention of 1924.

On examination, it does not appear that either argument is sound.

The first argument raises an important question of interpretation which goes to the root of the whole Convention. Briefly, the United States argument was that if United States coast-guard vessels were not allowed to pursue a suspected smuggler from within conventional limits on to the sea beyond, and were not (in the last resort) entitled to sink her rather than let her escape, then all that such a vessel would have to do when requested to stop would be to make off, and if, as would often be the case, her speed were sufficient, she would be able to get entirely away. Hence, to make the rights conferred on the United States by the Convention a reality, it was necessary to read into it a faculty to exercise these further powers.

Elaborating this argument, the United States contended that under the Convention certain "rights" were conferred upon the United States Government, viz. to board, search, and arrest vessels within certain limits and under certain conditions. The natural concomitant of these "rights", so it was alleged, was an obligation on the other Party to allow His vessels to be boarded, searched, and arrested. Hence, it was contended, the masters of the vessels concerned were under an obligation to stop when requested to do so. If they refused, then they were wrongdoers, and could not complain of the natural consequences of their refusal, viz. a pursuit and possibly, in the end, a sinking. It would seem, however, that the best view of such a Convention as the Liquor Convention of 1924 is not that it confers a positive right *stricto sensu* on countries in the position of the United States, but rather a *licence*, or faculty to do certain things under certain conditions. The natural concomitant of this is simply that the other Party, to use the words of article 2 (1) of the Convention, "will raise no objection" if that faculty is exercised, provided it is exercised in conformity with the given conditions. But there is no obligation on the other Party to compel His vessels or subjects to allow the United States to exercise the faculty in question, or to pass any legislation for that purpose, nor has any legislation in fact been passed by any of His Majesty's Governments for the purpose of making the Liquor Convention "binding," so to speak, on British subjects. The conclusion from this is that the persons or vessels concerned are not under any obligation (so-

called) to allow boarding, search, or arrest by United States coast-guard vessels. If the United States authorities are in fact able to carry out the boarding, &c., within the limits of and in accordance with the other conditions laid down by the Convention, then the other Party will not exercise the right which would otherwise exist to object to interference with British vessels on the high seas. That, in brief, is what the Convention seems to amount to, and there appears to be no warrant for saying that it goes any further.

It will be seen that underlying the United States argument there is an assumption that conventional limits, once agreed to, become similar in essence and may be treated on the same basis as territorial waters proper, and that United States law, as such, becomes applicable within such limits outside territorial waters. This assumption is believed to be quite false. Territorial waters proper are under the sovereignty of the territorial state. "Conventional waters" are not; they are in no sense part of the territory or territorial waters of the state concerned, but remain part of the high seas.[1] In territorial waters the territorial law may be made applicable as such, since these waters are under the sovereignty of the territorial state; but outside territorial waters the territorial law cannot apply, as such, within conventional limits, in waters which are in fact high seas.[2] In the same way, foreign subjects and vessels within territorial waters are actually and *de jure* subject to so much of the territorial law as has been made applicable to the waters in question, since they are present within the national jurisdiction. Within conventional limits outside territorial waters they are on the high seas, they are not within the jurisdiction of the territorial state and they are not subject to that state's national law.

It follows that the right of hot pursuit from within conventional limits, or the right to sink a vessel, cannot be derived from the supposed applicability of the territorial law to conventional limits, nor from the contention that vessels who refuse to stop when hailed are in breach of law and hence wrongdoers who cannot complain of the ensuing consequences. Conventional limits cannot be assimilated to territorial waters, and the powers which

[1] This fact is particularly clear in the case of a convention which, like that of 1924, begins with a specific affirmation of the three-mile limit as constituting the proper limit of territorial waters.

[2] Attempts to make it applicable, by enacting legislation locally, to be applied within such limits, have of course no *international* validity and cannot avail, as between the parties to a convention, to justify an act not justified under the convention itself.

may be exercised within conventional limits outside territorial waters depend on the Convention.

The United States, however, also put forward the following contention. They said that, under international law, the right of hot pursuit from territorial waters was founded on the view that, if a right to arrest in territorial waters existed at all, it was not lost merely by reason of the fact that the vessel concerned might make off in order to evade the exercise of that right. Similarly (it was contended), if there was a right to arrest within conventional limits, that right was equally not lost by the flight of the vessel. This, of course, presupposes that there is in fact a "right" to arrest within conventional limits outside territorial waters, and it has been suggested above that that is erroneous, because although the Convention confers a licence to arrest in certain circumstances, there is no "right" of arrest under the Convention comparable with the similar right which exists in territorial waters. So far as conventional limits outside territorial waters are concerned, any powers which may exist are derived from the Convention itself, and it is only by virtue of the Convention that any powers within such limits exist at all. The question of the exact extent of those powers depends upon the true interpretation of the Convention, and not upon analogies derived from the ordinary rules of international law applicable to a different state of things (i.e. applicable to the case of territorial waters, which, as has been observed, offers marked differences from that of "conventional waters").

If the above view is sound, the matter resolves itself into a consideration of the United States argument that without the powers for which the United States Government contended, the Convention would be illusory, and that accordingly these rights must be read into it. There seems in fact to be little warrant for such a view. Even without the right of hot pursuit from within conventional limits outside territorial waters, or the right of deliberate sinking, the Convention constitutes a remarkable advance on any powers outside territorial waters which the United States would have been entitled to exercise under the ordinary rules of international law. If these powers are not sufficient to enable smuggling to be adequately dealt with, it would seem that the remedy must be to seek a wider convention by negotiation, and there seems to be no sufficient ground for arguing that the existing Convention must be read in such a way as to incorporate the additional powers desired. Conventions of the type of the Liquor

Convention must be construed strictly, since under it countries in the position of, e.g., the United Kingdom forgo the undoubted right which they would otherwise have to object to interference with their vessels on the high seas. This right they agree to forgo, however, only if the intervention is exercised in a certain manner and within certain limits which are expressly laid down. There is, in consequence, no warrant for reading into the Convention inferences which would have the practical effect of extending those limits and those powers.

The position in regard to the actual act of sinking the vessel is the same. In support of the United States view, a case was quoted in which a United States vessel, the *Siloam*, had been fired upon by the Canadian coastguard authorities within Canadian territorial waters, and in which the United States Government had taken no objection to this action. That case can, of course, be no authority for the present one, since the act took place in territorial waters proper, and it affords no true analogy with the case of a firing or sinking within conventional limits outside territorial waters, where the question of the right to fire or sink depends on the Convention itself.

The Commissioners in fact decided that there was no right to sink under the Convention, and that such sinking was illegal unless it took place accidentally and in the course of exercising such force as was permitted by the Convention. In defining the degree of force permitted by the Convention, the Commissioners used the phrase "reasonable and necessary", but this phrase is ambiguous and may well lead to a contradiction. The force which is necessary to achieve an object is not necessarily reasonable force, unless it be admitted that the object is one which the party trying to achieve it is entitled to achieve at all costs—the very conclusion which the Commissioners negatived. The view of the Convention suggested by the Commissioners' conclusion therefore is that United States vessels are entitled to use all such reasonable force as is necessary for the purpose of effecting the boarding, searching, or arresting contemplated, and if in the course of this reasonable exercise of force the sinking of a vessel accidentally results, no complaint will be made. If, however, it proves impossible to achieve the objects aimed at except by the use of more than reasonable force, then those objects must, in the given case, be left unachieved.

In addition to finding that the sinking was not warranted by anything in the Convention, the Commissioners found that it was

not warranted by anything in international law. This view was not elaborated and its exact effect is not entirely clear.[1] International law, as such (i.e. its general principles), does not deal with the case of conventional limits outside territorial waters, nor of a sinking taking place at sea after a pursuit from within such limits. It only deals with the case of territorial waters, and of a pursuit on to the high seas from those waters. The Commissioners' view therefore apparently was that even in the case of a hot pursuit taking place from within territorial waters proper, the right of the pursuing vessel would not extend to more than effecting the arrest of the vessel pursued, in order to bring her into port for adjudication, and that a sinking, unless accidental, would be illegal. If so, then *a fortiori* it would be illegal where the pursuit started from within conventional limits outside territorial waters.

IV. *The Question of Damages and the Bad Character of the Vessel*

It was common ground between the parties that the *I'm Alone* was a vessel habitually engaged in smuggling or assisting to smuggle alcoholic liquor into the United States in contravention of United States law; and further that she was employed in an operation of this character on the particular occasion out of which the pursuit arose which ended in her sinking. It was not, however, at any rate in terms, contended on that account that the Canadian Government were debarred, even morally, from bringing the claim. In fact, it was expressly admitted at one stage by the United States Government that the Canadian Government were justified in doing so.[2] The Canadian standpoint on this matter was expressed by Canadian counsel as follows:

"I am submitting that there is one principle that is more vital than anything else in connexion with the claim that is here before this Tribunal, and that is the principle that, whether or not a person is a wrongdoer, if he suffers illegal injury, he should be entitled to redress.

"My submission is that the moral qualities of the operation are not relevant to these proceedings."

[1] One object of the Commissioners in giving this further finding was presumably to indicate that even if it were sound to regard the general rules of international law as applicable to a case arising under the Convention, those rules would not afford any justification for the sinking in the present case.

[2] In the United States brief before the Commissioners it was stated that:

"No question respecting the propriety of the action thus taken [i.e. in bringing the claim] is raised by the United States directly or by implication. This is true notwithstanding the knowledge of His Majesty's Government that the *I'm Alone* had been for a number of years engaged in attempts to smuggle liquor into the United States."

The United States Government did, however, indirectly advance the contention that the claim should not succeed by reason of the vessel's bad character.[1] In the first place they suggested that the Commissioners, in the exercise of their alleged advisory functions, would be justified in recommending the Canadian Government not to press the claim any further. Secondly, they suggested that the bad character of the vessel was in any case material on the question of damages: the Canadian Government might be entitled to some damages in respect of the technical injury to the British flag or to British sovereignty, but none should be awarded which might redound to the benefit of persons who were wrongdoers engaged in violating United States law.

In addition to this, the Commissioners, though purporting to place their recommendations on the subject of damages on the ground that the beneficial *ownership* of the vessel was not Canadian, appear to have been influenced by the nature of the vessel's activities; and the way in which they stated their views must give rise to some doubt whether these would necessarily have been the same had the facts as to ownership been similar, but the vessel herself an ordinary trader not engaged in smuggling and merely erroneously suspected of it by the United States coastguard vessels. (On this subject see p. 94 *supra*.) It seems desirable therefore to consider how far what may be called the "unmeritorious" character of a claim can properly affect the right to bring the claim, or the amount of damages recoverable.

To begin with the question of damages, it is fairly clear that if the United States argument on this question were admitted, it must lead to much the same practical result as if the claim were barred altogether where the vessel or private individuals concerned are wrongdoers. If, in such a case, the Government bringing the claim is not entitled to any damages, or only to nominal damages or to a comparatively small sum in respect of the technical violation of international law or treaty involved, it seems probable that the possibility of a claim will no longer act as a sufficient deterrent to prevent breaches of law or treaty in such cases.

[1] In support of this contention the following passage from Twiss, Section 181, was cited by Counsel for the United States:

"In ordinary cases, indeed, when a merchant ship has been seized on the open seas, by the cruiser of a foreign Power, when such ship was approaching the coast of that Power with an intention to carry on illicit trade, the Nation whose mercantile flag has been violated by the seizures, waives in practice its right to redress, those in charge of the offending ship being considered to have acted with *mala fides* and consequently to have forfeited all just claims to the protection of their Nation."

This view has especial force when the matter is considered in relation to breaches of such a treaty as the Liquor Convention of 1924, of which it is hardly too much to say that it specifically contemplates that claims may be brought in respect of vessels engaged in attempts to violate the law of the territorial state. Indeed it is *a priori* obvious with regard to such a convention that the vast majority of cases raising the question whether the revenue vessels of the territorial state have acted in accordance with the terms of the convention will relate to ships engaged in illicit activities. It is specifically in contemplation of these illicit activities that such conventions are made. They give the territorial state certain rights which it would not have under international law; but these rights are limited, not unlimited. To argue that the fact of the vessel concerned being a malefactor is a circumstance which disentitles the government bringing the claim from recovering any adequate damages, is to render the limitations set up by the convention illusory in a large class of case, indeed the largest if not virtually the only class of case likely to occur in practice. The financial benefit to the revenue of preventing the entry of an illicit cargo may easily outweigh the loss incurred by the payment of only nominal damages for a breach of the convention—and if so, all incentive to avoid breaches in any case where there is sufficient ground to suspect the vessel concerned of being a smuggler is gone.

It will readily be seen that considerations of a similar character may arise in the case of breaches of other kinds of treaties or of the general rules of international law; and it is submitted that the view that the "unmeritorious" nature of a claim, while not necessarily barring the right to bring it, may bar the right to recover adequate damages, is in practice contradictory and untenable. It would seem therefore that the only real question is whether the right itself is barred. If not, it would not seem permissible indirectly to achieve the same result as if it were, by a refusal or drastic restriction of damages.

The considerations already advanced on the subject of damages go equally to show that it would not be consistent with the Liquor Convention to regard "unmeritorious" claims arising under it as barred. Moreover, such a view would find no warrant in the terms of Article 4 of the Convention. If it were to prevail, the result would be to exclude by far the largest class of claim likely to arise. The limits and conditions set by the Convention could be ignored with impunity and the party whose vessels were

concerned would soon be left with no other course but to denounce the Convention and revert to the position under the ordinary rules of international law.

The latter, of course, afford no ground for the view in question, as the daily practice of nations shows. To take only one example amongst many that could be adduced, the fact that the national of one country arrested in another is admittedly a malefactor, guilty of a crime in the country of his arrest, does not disentitle his government from complaining (and in the last resort from bringing an international claim) in the event of his being ill-treated in prison or denied the ordinary forms of justice.

There seems in fact (and the citation by Counsel for the United States of the passage from Twiss given in note 1, p. 101, above is evidence of it) a tendency to confuse two different things: the *right* of a government to bring any claim on the ground of an alleged breach of a treaty or of international law, and its *discretion* in the matter of bringing such claims, in particular its discretion to refuse to bring claims unquestionably involving such a breach but which are considered "unmeritorious" on extraneous grounds. There is sometimes a tendency to argue that there is not merely a discretion but an obligation to refuse to bring such claims. A government is always entitled to refuse to bring a claim which it has a treaty or international law right to bring, but it is not possible to place any fetters on its discretion in this respect. Nor can the manner in which a government exercises this discretion be a subject for inquiry or adjudication by an international court, or it would cease to be a discretion. No doubt, in practice governments will often refuse on a variety of grounds to bring claims which they have a right to bring and will content themselves with a protest on such points of principle as may be involved, or a general reservation of their rights.[1] But where the case raises a point of principle of sufficient importance, or transcends the individual interests concerned and affects the rights of the state itself, governments will not desist on the ground of the unmeritorious nature of the private interests involved. In the

[1] It may indeed be said that governments have an obligation of honour and as a matter of comity to exercise a general supervision over claims for the purpose of satisfying themselves that these are serious and apparently well founded, not only technically but also in substance. This was recognized by Canadian counsel who said: "I recognize, of course, that the Government always exercises a supervision over a claim and would not present what it regarded as an unworthy or improper claim under the Convention." But the nature and importance of a claim may well transcend the private interests involved, and the government must be the judge of this.

present case, the Canadian Government, who, as was admitted by the United States, had always co-operated fully in the endeavour to suppress liquor smuggling, were not particularly concerned with the fate of the *I'm Alone*, as such; nor were they in the least interested in assisting smugglers or promoting smuggling. But they were interested, as an important point of general principle, in seeing that British ships were not interfered with on the high seas except to the extent, and no more, agreed upon by convention.

V. *The Question of Damages and the Ownership of the Vessel*

A breach of the Convention was in fact found to have occurred, and the remaining question relates to the nature and adequacy of the damages recovered by the Canadian Government in consequence of the breach.[1] These did not include anything in respect of the value of vessel and cargo. The question of the ownership of the vessel is here involved, since it was on this matter that the Commissioners based their refusal to award damages in respect of her. In view of what has been said, however, as to the Commissioners having also taken into consideration the bad character of the vessel and her illegal activities on the relevant occasion, it is necessary to notice that the two questions, though analogous, are legally quite distinct; and, moreover, that there is in law no warrant for the view that the presence of *both* factors would justify a decision which the presence of one of them alone would not. If, for instance, the existence of *de facto* United States ownership of the vessel justified a decision not to award damages in respect of her value, *qua* vessel, then it clearly justified this whether or not the vessel was engaged in any illegal activity; and conversely, if the illegal activities of the vessel would justify a refusal to award damages, the position would be the same even if both the *de jure* and the *de facto* ownership had been Canadian, and there had been no question of any United States "ownership" at all.[2] In order to see the ownership point in proper perspective, therefore, it is necessary to disassociate it from the illegal nature

[1] In round figures the Canadian claim, covering loss of vessel, cargo, &c., was nearly $400,000. The damages actually recommended by the Commissioners were a little over $50,000.

[2] The combination of the two, while having no legal effect, may, of course, have a considerable moral effect; and assuming that the Commissioners were purporting to make recommendations on a broad basis of equity and not to give purely legal decisions (cf. p. 94 *supra*), might well account for findings which would not have been the same had one or other factor been present, but not both.

of the enterprise, and to imagine that the vessel was an innocent trader, erroneously suspected, and dealt with in a manner not permitted by the Convention; but that, on the other hand, her Canadian *de jure* owner held her "in trust" for a beneficial or *de facto* owner of United States nationality.[1]

It is also necessary, in order to appreciate the exact point involved in the Commissioners' finding on damages, to notice that although the vessel was owned *de jure* by a Canadian *company*, the Commissioners' finding did not actually raise the question of the nationality of companies. It turned on the question of the ownership of the *vessel* and might and presumably would have been precisely the same if the Canadian *de jure* owner had been a single individual. In the first place, it appears that not only was the company Canadian in the sense of being registered in Canada, but that its entire or almost its entire shareholding was Canadian also. However the matter was looked at therefore, the company was unquestionably Canadian. What the Commissioners found was that this (Canadian) entity did not "really" own the *I'm Alone*, or that if it did, in the sense of having the legal ownership vested in it, it held only as "trustee"[2] for certain United States citizens who were the true *de facto* "owners". It will be seen that precisely the same might have been the case had the Canadian owner been a single individual, instead of a body corporate. But secondly, even had the shareholding in the company (being a Canadian company by registration) been in the hands of United States citizens, so that there might have been a question whether the company itself was "truly" Canadian, it would still not have been necessary to rest any finding on the ground of the *company's* nationality. It would still have been possible to find that, even assuming the Canadian nationality of the company, the latter held in trust for persons of United States nationality.

Clearly then, the fact that the legal ownership of the vessel was vested in a *company* is irrelevant to the Commissioners' finding, and in order to see the latter in its true perspective it would be preferable to assume that the Canadian owner was a single indi-

[1] While "double ownership", if it may be so called, vested in citizens of two different countries, may be likely to occur chiefly where some illegality is afoot, there is nothing inherently improbable in its occurring in regard to *bona fide* trade where neighbouring countries having a common language and similar legal system are concerned.

[2] The term "trustee" is here used in a popular or colloquial sense. The Commissioners did not in terms find the existence of any trust, legal or equitable, such as would be enforceable in a court.

vidual. The actual question raised by the Commissioners' finding might then be put as follows: Is it permissible, as a matter of international law, when a government puts forward a claim on behalf of one of its nationals as being the legal owner of property alleged to have been dealt with by the authorities of another country in a manner contrary to the general rules of international law or to the provisions of a treaty, either to reject the claim, or to refuse to award damages (or to reduce the damages) on the ground that the legal owner only holds as "trustee" for a *de facto* or beneficial owner of another nationality? The *de facto* owner might be of the nationality of the country against which the claim was brought, or of some third country not a party to the claim at all.

It will be convenient to leave on one side for the moment the question whether on this ground the claim itself as a whole could be regarded as barred, and to consider the matter first from the standpoint of the measure of damages. In the *I'm Alone* case, the United States argument was rested almost entirely on the ground that if damages were awarded to compensate for the loss of the vessel, as such, and her cargo,[1] these damages would go into the pockets of United States, not Canadian citizens. To put the point in more general terms, the argument amounted to this that a government cannot be required, by virtue of an *international* claim, to pay damages to its own citizens. Any claim which persons have against their own government must be pursued by means of such remedies as the relevant municipal law gives, and cannot be made the subject of international proceedings.

This argument is not, however, an adequate one on which to rest the view that in cases such as that under discussion damages may be refused. In the first place, it only applies, in so far as it applies at all, to the special case where the *de facto* owner is of the nationality of the defendant state, and it would not cover those cases in which the nationality is that of some third country. But secondly, the argument runs entirely contrary to the accepted view, for which support is found in decisions of the Permanent Court,[2] that any damages paid as the result of an international

[1] The facts relating to the ownership of the cargo appear to have been the same as in the case of the vessel.

[2] See for instance *Chorzow Factory* case, Series A, No. 17. A discussion of the point involved, on the basis of this case, will be found in a lecture by W. E. Beckett in *Recueil des Cours de L'Académie de Droit International*, Vol. 39, 1932—I.

claim are paid not to, or even for or on behalf of any private individual, but to the claimant government itself, whose property the damages become, and which has an unfettered discretion in regard to their disposal.

It will be seen that, according to this view, there is no legal basis on which an international tribunal could assume that damages, if paid, would in fact find their way into the pockets of persons having the nationality of the defendant state; or indeed into the pockets of any particular person at all. The injury done to the private persons concerned may, indeed, be, in part,[1] the *measure* of the damages recoverable by and payable to the government (and this fact suggests considerations of a different order which will be dealt with directly). But the damages would remain payable to the government, which would have complete power to keep them for itself, and not to hand them over to the private interests concerned; nor could its failure to do so be made the subject of any international proceedings.[2]

The *rationale* of the above position lies in the fact that a claim on behalf of a private person, involving an alleged breach of international law or treaty, once preferred becomes the claim of the government concerned, which is deemed, so far as the actual injury to its national is concerned,[3] to have sustained an injury in the person of that national.[4] In point of fact, the breach of international law or treaty, which is *ex hypothesi* involved, in itself constitutes an injury to the government, giving a right of action (on the assumption, of course, in those cases where the injury arises solely out of something done to an individual, that the latter is a national of the claimant government).[5] This sug-

[1] But only in part. The injury done to a state by a breach of international law, even though it arises solely out of an injury done to one of its nationals, is an independent injury giving to the government an independent claim and an independent right to damages, the amount of which will not necessarily coincide with the damages suffered by the individual concerned. See generally below, and *Chorzow Factory* case, Permanent Court, Series A, No. 17, p. 28:

"The damage suffered by an individual is never therefore identical in kind with that which will be suffered by the state; it can only afford a convenient scale for the calculation of the reparation due to the state."

[2] Whether it could be made the subject of any proceedings against the government concerned under municipal law, would, of course, depend on the relevant local law.

[3] The government may, of course, arising out of the same subject-matter, have sustained a direct independent injury such as would, for instance, be involved in the breach of a treaty to which that government was a party.

[4] See generally *Chorzow Factory* case, Series A, No. 17, p. 25 *et seq.*, and *Mavrommatis* case, Series A, No. 2, p. 11.

[5] Mention is made later of the difficult case which arises when there is a breach

gests that if any adequate legal basis at all is to be found for the view that the *de facto* ownership of the property involved, by a person not having the nationality of the claimant state, affects the right of that state to recover damages, it must lie in the following considerations. A government can, in the case of a claim founded solely on an injury to a private person, only bring an international claim on behalf of that person if he is its national.[1] In making a claim on behalf of a person who is its national, and in so far as the claim is on behalf of that person, the government alleges, in effect, that in the person of its national it has sustained an injury. When, however, the claim arises out of an injury to property, and it appears that, although the legal ownership of the property is vested in a national of the plaintiff state, the *de facto* ownership lies in a national of some other state, then it may be argued that the claimant government has not, so far as the ownership of the actual piece of property goes,[2] sustained any injury in the person of its national, since the latter has not himself *de facto* sustained any injury.[3] From this it might be argued either that the claim itself, as such, could not succeed, since it was "really" brought on behalf of a person not a national of the claimant state, or alternatively that no damages in respect of the injury to the property could be recovered, since the person on whose behalf the claim was brought had not *de facto* sustained any damage by reason of this injury. This argument (if sound at all), it will be noted, applies both to the case where the *de facto* owner is a national of the defendant state and where he is a national of some third state.

But is the argument sound? Certain preliminary points may be noticed. In the first place, the argument will scarcely avail to deny to the government concerned the right to bring the claim at all, and to obtain judgment if a breach of international law or treaty is established. If the matter is one which involves a breach of treaty or something else in which the government itself, as such, is directly concerned, the claim can clearly be brought, and if the

of treaty, but the person injured thereby is not a national of the party to the treaty entitled to complain of the breach.

[1] It hardly seems necessary to quote authority for this well-established rule, but see generally Sir Cecil Hurst, "The Nationality of Claims", in *British Year Book of International Law* for 1926.

[2] It may, of course, have sustained injury under some other head, e.g. to its flag, or because of a breach of a treaty to which it is a party.

[3] This is assumed for present purposes. The *de jure* owner may well have sustained *some* injury.

breach of international law or treaty can be established, judgment will be obtained. If the matter involves the breach of a treaty to which the government is a party, the latter could, in the writer's view, bring a claim, even if the private persons (if any) affected by the breach were not its nationals (*vide infra*). If the government is not, as such, directly concerned, it can, even so, scarcely be contended that a government has no right to bring a claim where the individual involved is both its national and *de jure* the owner of the property affected. It may be that in practice a government would not in fact bring a claim of the latter kind if it knew that its national, although the *de jure* owner, had no real material interest at stake. The matter is dealt with on pp. 105–8 above, where it is pointed out that a government might nevertheless, and justifiably, elect to do so, if it considered that the case involved a point of principle of an importance transcending the individual interests concerned. If the claim were brought, and a breach of international law were established, the government would be entitled to judgment.

But what of the damages recoverable as a result of such judgment? It would seem that, whereas under municipal law there may be an infringement of a right without any damages being recoverable, if none have in fact been suffered,[1] under international law a government is always entitled to *some* damages in respect of a breach of international law or treaty, irrespective of whether the breach has caused any actual material damage or pecuniary loss;[2] and where the breach arises out of an infringement (where

[1] Trespass to land is a common instance.

[2] In cases of breach of treaty, the writer's view is that the government against whom the breach is directed is always entitled to some damages even though the private persons affected by the breach do not happen to be its nationals. A common instance of this occurs where by treaty goods produced or manufactured in country A are entitled to certain treatment in country B, and such treatment is not accorded. Country A is entitled to damages (though it may be a question exactly how much), even though it turns out that the goods are not owned by a national of country A and may, indeed, be owned by a national of country B. In this case, of course, country A has in fact sustained damage, because the goods, though not owned by one of its nationals, are produced or manufactured in its territory. But cases may well arise in which a state is entitled to damages as the result of a breach of treaty, even though it has not sustained any actual material damage. The following is an example. Country A has received from the government of an oriental country certain territory in that country on perpetual lease, amounting to a virtual cession. Subsequently country A agrees to effect a rendition of that territory on certain conditions, one of which is that all privately owned property in the territory, shall, in perpetuity or for a term of years, be exempt from certain taxes. The rendition is effected, but the local government subsequently attempts to tax certain privately owned property in the territory, which turns out to be owned by a person *not* a national of country A.

the infringement is contrary to international law) of the rights of an individual, the damage thereby sustained by his government is an independent damage not identical with that of the individual.[1]

The point reached therefore is that notwithstanding the fact that the individual concerned is only the *de jure* and not the *de facto* owner of the property involved, his government is, if there has been a breach of international law or treaty, entitled to judgment and to some damages. The next question is whether these damages should include a sum in respect of the actual pecuniary loss or material damage involved, and the argument is that where the property concerned is *de facto* owned by a person not a national of the claimant state, that state has not in fact, in the person of its own national (the *de jure* owner), suffered any actual material damage or pecuniary loss in respect of the property itself, so that it is not entitled to any damages under that head, whatever the damages recoverable under other heads. This argument will, of course, clearly not apply to those cases in which the claimant state, *qua* state, may be said itself to have suffered material loss by reason of the way in which the property has been dealt with (for a concrete instance see beginning of note 2, p. 109). It can only apply therefore where the damage to the state arises *solely* from the fact that the property is *owned* (or alleged so to be) by one of its nationals.

It will be seen that before the argument can be applied at all in this latter class of case it will be necessary to have in fact looked behind the legal ownership and to have decided that it does not coincide with the beneficial ownership. Once this has been done it may indeed be permissible to conclude that the claimant government has not suffered any actual material damage in the person of its national (the *de jure* owner). It is suggested,

It is submitted that country A has a right to damages in respect of the breach of treaty, if the attempt to tax is persisted in, even though it has not, either in the person of any of its nationals, or, it would seem, in any other way, sustained any actual pecuniary loss. It may be, of course, that country A would not, in the given case, think it worth while to insist on its rights. But it would be entitled to do so, and might well consider that a point of principle of sufficient importance was involved to warrant such action.

In the same way breaches of the general rules of international law will give rise to a right to recover damages even though no pecuniary damage is involved. For instance, if the frontiers of a country are intentionally violated by the armed forces of another, the first-named country will, it is suggested, be entitled to substantial damages, even though the troops have, in fact, retired without committing any material damage.

[1] See p. 107, n. 1 above.

however, that the real issue is in what circumstances is it proper to go behind the legal ownership at all.

The answer seems to be that there are two classes of case which must be clearly distinguished. First there is the case in which the "double ownership", so to speak, arises from a trust, or something analogous thereto, enforceable in the appropriate municipal court. Secondly, there is the case where the "double ownership" arises not from any such trust, or analogous relationship, but from what may conveniently be characterized as an extra-legal (and legally unenforceable) state of fact. In brief, is the relationship between the two "owners" a legal[1] or merely a factual relationship?

In the first class of case, where the legal or *de jure* ownership has, by the relevant municipal law applicable, to be exercised in a certain way, and upon certain conditions, for the benefit of another person to whom legal remedies are available in case of need, there is evidently, so to speak, a rational and *a'priori* basis on which an international court can look behind the legal ownership and come to the conclusion that the beneficial ownership resides elsewhere. Even so, it will not necessarily follow that the *de jure* owner has suffered no damage at all, but that will be a question of fact.

Where, however, the alleged *de facto* owner has no legal means of exercising any control over the property, or of enforcing upon the *de jure* owner any of the conditions under which the latter is supposed to hold it; where in fact he has no means of asserting his "ownership" except by extra-legal action or pressure, so that the *de jure* owner has an unfettered right to dispose of the property as he pleases, it would seem that there are no adequate grounds for separating the *de facto* from the *de jure* ownership. It was the Canadian contention in regard to the *I'm Alone* that the case fell into this latter class.

[1] "Legal" is here used to cover any relationship or remedy, whether its incidents arise from law or equity (in the English technical sense of the term equity), provided the relationship is enforceable or the remedy available in a municipal court.

THE GOLD CLAUSE

By B. A. WORTLEY, LL.M., Reader in Law in the University of Birmingham

I. *The Nature of the Gold Clause*

THE recent changes in British monetary policy have had their repercussions in the courts of this country and of many others. Changes of a no less radical nature have been effected in the United States and in other countries, in the last few years. We are concerned, in this article, not so much with the theory of money,[1] as with the solutions of common international problems worked out in some of the leading courts of the world since the World Crisis.

Lack of faith in the stability of currency has led to the use of what is known as "the gold clause" in many contracts of an international nature; and in some countries, such as the United States of America, this clause has been commonly used in purely internal contracts in order to provide for a definite standard of value in much the same way as the amount payable by the English farmer for tithe was formerly fixed by law according to the price of corn.[2]

The gold clause, being a matter of private contract, takes many different forms. But the three main types of the gold clause in modern usage have been defined by Dr. Arpad Plesch[3] in the following terms:

"The *gold clause proper*, obliging the debtor to discharge his obligation in gold as a commodity;

the *gold coin clause*, obliging the debtor to discharge his obligation in gold coins minted by a certain state;

and the *gold value clause*, imposing on the debtor the obligation to return in paper currency a sum which was equivalent to the value of a fixed quantity of gold in the open market."

The object of a gold clause of whatever kind is to protect the creditor. Until recently such clauses were comparatively rarely used in England except in some international matters, sterling being generally taken to be "as good as gold".[4]

[1] An interesting article on the legal theories of money appeared in the *Cornell Law Quarterly*, vol. XX, p. 52, by Mr. Phanor J. Eder of the New York Bar.

[2] See E. Lambert, *Un parère de Jurisprudence Comparative*, 1934. Paris, Marcel Girard, p. 151, for various French expedients to avoid the effects of deflation by fixing rents according to the local price per cubic metre of masonry and the like.

[3] *The Gold Clause, A Collection of Cases and Opinions*, 2nd ed. 1936. Stevens, London, p. v.

[4] Nussbaum, in an article in *Yale Law Journal*, Vol. XLIV, says, at p. 63, "The

So long as this country remained on the gold standard sterling was as good as gold. But sterling no longer gives any right to claim a specific quantity of gold fixed by law. It follows, therefore, that a right to receive gold can now only be deduced from the express wording of a contract: it is no longer implied by law from a reference to sterling.

But all attempts to provide for payment of a specific amount of gold under a contract have not been equally successful. Dr. Plesch (*op. cit.*, p. v) has pointed out that a *gold clause proper* providing for the delivery of a quantity of gold as a commodity may become ineffective when a government interferes with the free market of gold, and that a *gold coin clause* is apt to become stultified when a government substitutes paper notes for gold coin. The main thesis propounded by Dr. Plesch is that a clause which can be construed as a *gold value clause* has, in practice, a better chance of achieving its object than either of the other two types of gold clause, since it does not attempt to do more than to measure the amount of currency due to the creditor by referring to the market price of a specific quantity of gold metal.

In view of the fact that the intention of a gold clause is to protect the creditor, it is not surprising that on many occasions courts have tended to carry out this intention by construing the words of a clause as a gold value clause rather than as a gold coin clause or as a gold clause proper.

II. *Some Foreign Interpretations*

The starting-point of the modern cases reviewing the gold clause may be taken to be the decisions of the Permanent Court of International Justice at The Hague, given on July 12, 1929, in the *Serbian and Brazilian Loans* cases.[1] The principles applied in both cases were the same.

It was held that the substance of the debt and the currency of payment should be distinguished; for, as it is the purpose of the gold value clause to safeguard the substance of the debt unimpaired by changes in the coin of payment, the proper law

problem of the gold clause in England has quite a minor importance." See also Phanor J. Eder, *Georgetown Law Journal*, Vol. XXIII, p. 755: "No small share of England's outstanding success in world trade and a preponderant share of her success in finance were due to the prestige enjoyed by the pound sterling as an immutable standard of value. Gold clauses in bonds, as a result, were practically unknown. The *Feist* case (see below) . . . seems to have arisen almost by accident."

[1] Publications of the P.C.I.J., Series A, Nos. 20 and 21; and see Plesch, *op. cit.*, p. 1; Lambert, *op. cit.*, p. 190.

of the contract relating to the substance of the debt may be different from that governing the currency of payment.

The Serbian loans were obtained by the Serbian Government in pre-war days, in terms of gold francs. The law of the debtor state governed the substance of the transaction because a Sovereign State, *prima facie*, submits only to its own law; French law, the *lex loci solutionis*, regulated the currency of the payment. Payment in gold francs was no longer possible by the *lex loci solutionis*, and the court concluded:

"if the franc which is legal tender at the place fixed for payment does not possess the value of the gold franc as defined in this judgment, payment must be effected by the remittance of a number of francs, the value of which corresponds to the value of the gold francs due . . . ."

This case, then, is an example of the effectiveness of the gold value clause.

The French courts are, apparently, prepared to recognize gold value clauses only if they occur in international contracts; they do not recognize them in internal contracts.[1] Such clauses must be expressly set out by the parties to the contract or appear by necessary implication from the terms of a contract; they will not be implied merely from stipulations for payment in coinage which happens to be "on gold".[2]

The Supreme Court of the German Reich in a decision of July 5, 1935 (Plesch, *op. cit.*, p. 97) reconciling conflicting judgments of lower courts, held that where an insurance policy issued by a Swiss company provided that a gold mark should be understood to be worth a fixed number of American dollars, the depreciation of the dollar in terms of marks did not affect the obligation to discharge the contract by payment of the number of marks therein fixed. The court observed:

"It was the declared intention of the parties to create a gold value obligation and not a currency obligation. The parties understood thus in the present and similar provisions, under 'dollar' clearly gold dollars at the time when the contract had been entered and not the dollar currency of the present time." (Plesch, *op. cit.*, p. 98.)

[1] See decisions of the Court of Cassation in the *Rosario* case, July 9, 1930; the *Société Heraclée*, July 7, 1931; and the decision of the Court of Appeal at Dijon, December 31, 1931 (all cited by Phanor J. Eder, *The Law as to the Gold Clause*, 1933, New York, at pp. 4–8), and Lambert, *op. cit.*, p. 181.

[2] Lambert, *op. cit.*, pp. 181–3, and the decisions of the Court of Cassation in the *Chemin de Fer de Puerto Belgrano*, December 21, 1932; the *Compagnie Internationale des Wagons Lits*, December 6, 1933; and in the case of the Moroccan 5 per cent. Loan, reported in *Clunet*, 1936, p. 115.

We have the authority of Domke[1] that the gold value clause has been recognized from time to time by the Supreme Court of Finland, by the Swiss courts, the Austrian courts, and the courts of Norway. While Mr. Eder tells us that:

"The South American courts have usually upheld the gold clause. The Argentine Supreme Court has rendered many important decisions, not all precisely in point, but in general effect upholding the gold clause, against the provinces of San Juan, Tucumán, Buenos Aires, Mendoza, and Corrientes."[2]

The attitude of the Italian courts with regard to the gold clause is of special interest, since the sanctions recently imposed on Italy make gold one of the few commodities that she can export to sanctionist countries. Domke[3] mentions two Italian cases, both decided before the application of sanctions against Italy: a decision of the Court of Turin of June 26, 1934, unfavourable to the bearers of gold bonds, and that of the Court of Milan of January 5, 1934, recognizing the validity of a gold value clause based on gold dollars. The last-mentioned decision was confirmed on July 19, 1934, by the Milan Court of Appeal (see *Clunet*, 1935, p. 1085).

III. *The Joint Resolution of the U.S. Congress*

The American decisions on the gold clause have attracted a great deal of attention, and have been the subject of a special monograph by M. Martin Domke (*La Clause Dollar-Or*, 1935. Les Éditions internationales, Paris). This work is reviewed elsewhere in this volume. The question around which controversy rages is how far the Joint Resolution of the U.S. Congress of June 5, 1933,[4] abrogating gold payments in that country, has affected the rights of foreigners and foreign contracts made in terms of gold dollars.

The constitutionality of this resolution has not been successfully challenged so far as it relates to private contracts between American citizens.[5]

[1] *La Clause Or dans la jurisprudence récente, passim.*

[2] *The Law as to the Gold Clause*, p. 10.

[3] *Op. cit.*, p. 18.

[4] Set out in an article by Phanor J. Eder in *Cornell Law Quarterly*, Vol. XIX, pp. 1–4, Note (2), and Plesch, *op. cit.*, pp. 24 and 25.

[5] In an article, which seems to have been written before the Resolution was passed, Messrs. R. L. Post and D. H. Willard gave it as their opinion (*Harvard Law Review*, Vol. XLVI, p. 1257) that "possibly the court would uphold a statute nullifying the gold clause . . . on the ground that all money contracts, notwithstanding express words of limitation, are made subject to the exercise of the power of Congress to declare what constitutes money". See also Phanor J. Eder, *The Law as to the Gold Clause*, p. 26.

In the leading case of *Perry* v. *United States*, 294 U.S.,[1] decided in February 1935, the Joint Resolution was held by the Supreme Court of the United States not to be capable of overriding the obligation of the U.S. Government on a Liberty Bond, although the gold value of the bond in question was not allowed to the plaintiff on the ground that he had suffered no loss of buying power by reason of the Joint Resolution, since the dollar was still of the same value in the internal market of the United States, even though the gold standard had been abandoned.

The court said (pp. 350–1 of the U.S. report):

"There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of Congress to alter or repudiate the substance of its own engagements when it has borrowed money under authority which the Constitution confers."

This case has been reviewed by H. M. Hart in an article in *Harvard Law Review*, Vol. XLVIII, p. 1098, who observes that:

"Only one valid reason existed for declaring the Joint Resolution unconstitutional. That was the reason which the Chief Justice gave, but it was a reason which required, if it was to continue to be valid, that the bondholder should recover. The maintenance of the credit of the United States, said the Chief Justice, is of paramount importance."

And there seems much to be said for this view.

In *Perry's* case McReynolds J. delivered a strong dissenting opinion following the *Serbian* and *Brazilian Loans* cases and the House of Lords in *Feist's* case (see later), holding that the plaintiff was entitled in accordance with the intentions of the parties to the gold value of the Liberty Gold Bond. McReynolds J. expressed a similar dissenting view in *Norman* v. *The Baltimore and Ohio Railway*, also reported in 294 U.S., and decided in February 1935,[2] where the majority of the Supreme Court held the Joint Resolution to apply to a gold clause in a contract made between two American companies, and said (at p. 305)

"Contracts must be understood as having been made in reference to the rightful authority of the Government, and that no contract can be entered into to the defeat of that authority."

In *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, decided in May 1935 by the Appellate Division of the Supreme Court of New York County (*v.* Plesch, *op. cit.*, p. 56), the majority opinion was that an agreement to pay a specified amount of gold coin in New York, or a specified amount of sterling in London, or a

[1] Plesch, *op. cit.*, p. 38.

[2] Plesch, *op. cit.*, p. 25.

specified amount of guilders in Amsterdam, did not permit the plaintiff to claim an increased amount of dollars in Amsterdam on account of the fact that dollars had depreciated in terms of the guilder which was still on gold. The court's decision followed the previous decisions of the U.S. Supreme Court in *Norman's* case, *Perry's* case, and *Nortz* v. *U.S.*, all reported in 294 U.S. Both the City Bank and the Steel Company were American companies and therefore subject to American law. The court, however, pointed out that:

"It is not contended by the appellant that the holders of these coupons, who are subjects of England and Holland respectively, are governed by the terms of the Joint Resolution. . . . It is claimed, however, and rightfully so, that the citizens of our country are controlled by the terms of the Joint Resolution. . . ."

This *obiter dictum* and the dissenting opinion of Merrell J. have been made much of by Plesch, who sets out the dissenting opinion (*op. cit.*, pp. 59–65), and observes that it has been adopted in favour of a non-American bondholder by the St. Louis South Western Federal District Court in a motion granted in *Anglo-Continental A.G.* v. *St. Louis S.W.R. Co.* This decision, it would appear from the *Financial News* of April 7, 1936, has been unsuccessfully attacked in the U.S. Supreme Court, "which refused to take jurisdiction in the case".

The Joint Resolution clearly affects subjects of American law; it does not affect the obligations of the American Government, but it is very doubtful how far it affects the rights of foreigners.

Let us consider some of the European interpretations of the Joint Resolution.

In the case of the *Skandia Insurance Company Limited* v. *The Swedish National Debt Office*, decided by the Royal Svea Court of Appeal, Stockholm, on April 16, 1935,[1] the Swedish National Debt Office had floated the loan in gold dollars in 1924. Following the reasoning in the *Serbian Loans* case, Swedish law was applied to the substance of the Swedish Government's obligation, American law, the *lex loci solutionis*, to the question of payment. Payment in gold dollars was not legally possible in 1933 in the United States, but this was held not to affect the right of the bondholder to claim the gold value. The Joint Resolution was deemed not to have affected the rights of persons not resident in or subjects of the United States. The opinion of Professor

[1] Plesch, *op. cit.*, p. 66.

Sauser-Hall, of the Universities of Geneva and Neuchâtel, given in this case, is particularly interesting. His view is that:

"the law of the place where payment must be made . . . only has a qualitative and not a quantitative effect. The law of the place of payment indicates how the debtor can clear himself but not how much he must pay."

The decision of the Civil Court of Antwerp on January 5, in the case of *A. Peten* v. *City of Antwerp*,[1] also followed the *Serbian Loans* case. The Antwerp loan was issued in 1928, interest was to be paid in gold coin of the United States. Once more American legislation was held not to have affected the substantive rights of the parties, the court saying:

"The American monetary laws relied on are of strictly territorial operation . . . which bind all persons in the United States territory; but . . . no rule of law makes them applicable abroad."

In his consultative opinion Professor Ch. De Visscher, of the University of Louvain, said:

"It is a case purely and simply of the fundamental principle of respect for acquired rights, a principle which is universally admitted in international relations and expressly endorsed by the findings of the Permanent Court of International Justice."

This decision was expressed to follow the decision of the English House of Lords in the *Feist* case, mentioned hereafter. Judgment was given for payment at the office of the defendants in London, in accordance with the contract, of the cost in pounds sterling, or Belgian francs, of the gold content of the dollars due under the contract.

There is also a case decided by the Austrian Supreme Court on April 9, 1935 (see *Clunet*, 1936, p. 190), in which that court held that the Joint Resolution did not affect a gold dollar contract *payable in Austria*, and allowing the plaintiff to claim the official National Bank rate for the gold dollar.

A similar view was taken in the case of *S. G. Appeldoorn* v. *The German Osram Co.*, decided by the District Court of Amsterdam on March 22, 1935.[2] It was held that the Joint Resolution did not affect the right of the plaintiff to recover the gold value of a bond given by the *German* company promising to pay bearer "1,000 gold dollars of the U.S.A. of the present (Dec. 2, 1925) standard of weight and value". But here, as in the Austrian case, payment was not to be made in the U.S.A.

There is, however, authority for recognizing the effect of the

[1] Plesch, *op. cit.*, p. 106.

[2] Plesch, *op. cit.*, p. 90.

Joint Resolution on contracts in respect of which payment is due in the U.S.A. Domke[1] deplores the decision of the Dutch Court of Appeal at The Hague in the *Royal Dutch 4 per cent.* and *Bataafsche 4½ per cent. 1927*, given on January 14, 1935, and discussed in *Clunet*, 1935, p. 540 *et seq.*, by Dr. F. D. Curtius.[2] In that case principal was to fall due, and interest was to be payable against coupons by bankers in New York, but coupons were to be collectable in several different places outside the U.S.A. in cash, according to the current rate ruling in those places for American gold coin. The Dutch court rejected the suggestion that the amount of payment should vary from place to place, holding that the contract was essentially an American one for the payment of coin in America. Domke criticizes the distinction between the words "payable" and "collectable", and holds that they are often used indiscriminately in international contracts. Further, in his article "La clause valeur-or dans la jurisprudence récente",[3] Domke gives it as his opinion that the clause in this case should have been construed not as a gold coin contract, but as a gold value contract.

There is also a decision of the Supreme Court of Copenhagen of December 14, 1934, on the same lines as the *Bataafsche* case, applying the Joint Resolution to a gold clause in the case of a loan by the Copenhagen Telegraph Company payable in New York.[4]

To sum up, it would seem, then, that the Joint Resolution is probably effective to stop payment of gold value in the U.S.A., though the matter cannot be regarded as entirely settled in the case of non-American creditors; although a Danish and a Dutch court have recognized the effectiveness of the resolution so far as regards payments due in the U.S.A., the Swedish court has not done so, and there is some American opinion against such recognition; a Belgian, a Dutch, and an Austrian court appear to have ruled that the Joint Resolution is not capable of affecting contracts of which the *locus solutionis* is outside the U.S.A.

In concluding this section we may observe that the American Joint Resolution is by no means the only legislative enactment affecting the gold clause. Domke[5] mentions Austrian, Brazilian,

[1] *La Clause Or*, p. 37.
[2] See also *Clunet*, *op. cit.*, p. 561.
[3] *Revue de Droit International Privé*, 1935, p. 29 *et seq.*
[4] Domke, "La Jurisprudence récente", *op. cit.*, p. 17; Nussbaum, *op. cit.*, p. 81.
[5] "La Clause valeur-or dans la jurisprudence récente", p. 3.

Polish, Luxembourgeois, Egyptian, and Danzig legislation on this topic. An account of the Polish law of June 12, 1934, on gold payments, which contains 38 articles, has been written by Domke;[1] apparently the gold dollar and sterling clauses are abrogated in respect of debts payable in Poland, and debts payable abroad may be paid in money which is legal tender at the place of payment, e.g. gold dollars due in the U.S.A. may be discharged in paper dollars.

No doubt this legislation will also give rise to problems of interpretation and application no less complex in nature than those caused by the American Joint Resolution. Is it too much to hope for international agreement on the subject?

IV. *The English Cases*

Before discussing the recent decisions on the subject of the gold clause, it may be as well to remind ourselves of some of the relevant general principles of English private international law.

Dicey's sixth general principle runs as follows:

"Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties."

This is in harmony with Dicey's first general principle:

"Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts, and no right which has not been duly acquired is enforced or, in general, recognized by English courts."

These rules are, however, qualified by the second general principle which enunciates, in equally wide terms, the various exceptions to them:

"English courts will not enforce a right otherwise duly acquired under the law of a foreign country:

"(*a*) where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation;

"(*b*) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions;

"(*c*) where the enforcement of such right involves interference with the authority of a foreign state within the limits of its territory." (*Conflict of Laws*, 5th ed., pp. lxv and lxvi.)

The first decision that calls for consideration is that of Rowlatt J. in *Westralian Farmers Ltd.* v. *King Line Ltd.* (47 T.L.R.

[1] *Bulletin de la Société de Législation comparée*, Vol. LXIII, p. 365.

586). This was given on July 21, 1931, before England abandoned the gold standard. The charter-party there construed was in a common form, and clause 35 thereof provided that any sums due thereunder in Australia to the plaintiffs should be paid to the plaintiffs in Australian currency. Rowlatt J. gave effect to the declared intention of the parties in accordance with Dicey's sixth general principle, saying at p. 587:

"The commission (claimed by the plaintiffs) was not part of the freight to be paid in London and to be transmitted to Australia. It was a debt arising in Australia and, *prima facie*, had nothing to do with any question of exchange. The question arose because the commission was calculable as a percentage on a European payment. The commission was to be paid in Australian currency, and the freight was to be paid in sterling. . . ."

At the time of his decision, as the learned judge observed, the Australian and the English pound were coins with the same bullion content, although the Australian Government then had the right to call in gold coins and to exchange paper for them. By December 14, 1931, when the appeal had been brought before the Court of Appeal, England had abandoned the gold standard and, by the Gold Standard (Amendment) Act 1931, the obligation of the Bank of England to sell bullion was suspended.

The Court of Appeal, consisting of Greer and Slesser L.JJ., with the late Scrutton L.J. dissenting, reversed the decision of Rowlatt J. Scrutton L.J. was, however, careful to base his dissenting judgment on the construction of the charter-party, and not to discuss questions of currency. The majority of the court thought that Australian and English currency were two different things and that, as freight was payable in British sterling, a percentage thereof, payable in Australia, should also be ascertained in British sterling (see 48 T.L.R. 158). The House of Lords, however, on July 5, 1932, restored the judgment of Rowlatt J. (48 T.L.R. 598). Lord Macmillan said:

"The currency of both countries alike consists of pounds, shillings, and pence, and the effect of clause 35, as I read it, is that any sum of pounds shillings, and pence is to be paid in Australian pounds, shillings, and pence irrespective of any question of exchange."

Lord Wright agreed with Lord Macmillan, and Lords Tomlin, Warrington, and Thankerton concurred.

We may take the *Westralian* case as one depending upon the correct interpretation of the intentions of the parties to the contract, and as showing that the terms pounds, shillings, and pence, used in an international contract, may be ambiguous unless

construed with the terms of the contract as a whole. Further, it is clear that the English courts, like the French courts, will not construe a contractual reference to pounds, shillings, and pence as an implied reference to a specific quantity of gold and other metals even though, at the time of contracting, the pound was "on gold".

This view was taken in the next case, that of *Broken Hill Proprietary Company* v. *Latham and others*, [1933] 1 Ch. 373, when Maugham J., (as he then was) held in a passage subsequently approved by Lord Wright in the House of Lords ([1934] A.C. 160), that:

"A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but it is *prima facie* a contract to pay money according to the currency of the country where payment has to be made."

This view, which was approved by Lord Hanworth in the Court of Appeal, but disapproved by his colleagues on the bench, Lawrence and Romer L.JJ., must be taken as correct, and the judgment of the majority of the Court of Appeal in the *Broken Hill* case, in so far as it differs from this statement, must now be taken as overruled (*v.* Lord Tomlin, [1934] A.C. at p. 146). The *Broken Hill* case concerned the interpretation of certain 7 per cent. mortgage debentures issued by an Australian Company and payable, at the option of the holder, in Australia or London. Lord Hanworth based his correct dissenting judgment on the rules for determining the intentions of the parties to a contract set out by Dicey (*op. cit.*, p. 672)[1]. The *Broken Hill* case had come before the Court of Appeal on October 27, 31, and November 1, 1932.

The case of *Prudential Assurance Company* v. *Adelaide Electric Supply Company Ltd.* (49 T.L.R. 224) was decided by Farwell J. on February 1, 1933, and he felt bound to follow the erroneous

[1] "In the absence of countervailing considerations, the following presumptions as to the proper law of the contract have effect:

"First Presumption. *Prima facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country. Second Presumption. When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)."

"These propositions", said Lord Hanworth, "may be taken to apply to the present debenture. If so, when the debenture is presented for payment in London, it ought to be paid in English currency."

decision of the Court of Appeal in the *Broken Hill* case, and on April 26, 1933, the Court of Appeal (Hanworth M.R. and Lawrence and Romer L.JJ.) followed the same decision.

The position has at last been cleared up by the House of Lords in two luminous decisions contained in 1934 Appeal Cases.

It is noteworthy that Mr. Wilfred Greene, K.C. (as he then was), in his successful argument before the House of Lords, at p. 132 of the *Adelaide* case, adopted two presumptions about the proper law of the contract put forward by Dicey at p. 671, to which we have already alluded, and the House, Lords Atkin, Warrington, Tomlin, Russell, and Wright, reversed the decisions of Farwell J. and the Court of Appeal, making it quite clear that payment of a debt due in Australia was effectively discharged there by payment in Australian pounds. The following points may be noted:

Lord Atkin (pp. 134 and 135), was of opinion,

"... that ... while both England and Australia were on the gold standard, the 'pound' in either country *expressed a value* measured in gold sovereigns or in promises contained in notes by whatever institutions issued, which were as good as gold."

Lord Tomlin, at page 142, expressed the view that the judgment of Maugham J. in the *Broken Hill* case was correct. He had held that *in October 1920*, "there was no Australian pound as a unit or *money of account*, distinct from the English pound ... in January and February 1921". Lord Warrington (p. 138), Lord Wright (p. 154), and Lord Russell (p. 148), were of the same opinion.

After 1933, when both countries abandoned the gold standard, Lord Atkin (at p. 135), said that without expressing a final opinion he was inclined to think that the English and Australian pound are not the same. Lord Warrington (p. 138), was of opinion that,

"merely as a *unit of account*, the pound, symbolized by the '£', is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged."

Lord Tomlin said (p. 144):

"I am not able to convince myself that the course of events subsequent to 1921 has made any difference in the theoretical position that there is one *common money of account*. It is true that neither country is any longer on the gold standard and that in each country as part of legal tender there is an inconvertible note issue but ... there are still in law, as there always have been, common elements in the two currencies."

Similarly Lord Russell (p. 148):

"The pound in Australia was *originally the same unit of account* as the pound in England, not merely a unit of account with the same name, . . . it is impossible to say that any other or different unit of account has ever taken its place."

Lord Wright (p. 155) took rather a different line:

"Not only in a business sense but in a legal sense, the currencies of England and Australia are and were at all material times different currencies, notwithstanding the identity of the unit of account."

It would seem, therefore, from the *Adelaide* case that in 1920 the £1 English and the £1 Australian were the same money of account; Lords Warrington, Tomlin, and Russell held that there is still a common money of account in England and Australia although the gold value of each £1 is now different.

The use of money of account has been explained by Mr. Phanor J. Eder in these words:[1]

"The Law Merchant grows surprisingly. Substitutes for money, especially the bill of exchange and the Exchequer tally, spring into use. Among these usages of merchants, devised to obviate the disadvantages of constant variations and of the depreciation by wear and by clipping of the currency, was recourse to a money of account, based on a fixed weight and fineness of metal. This innovation has survived to this day, sanctioned by Statute. In many countries, including the United States under recent legislation, there is a money of account, an uncoined standard weight of metal, separate and distinct from the actual money in circulation. The Kings of France adopted prohibitions against the use of a money of account, but in vain; commercial usages prevailed. In England, no such attempt against the liberty of the citizen was ever made. The pound sterling was long a money of account, before any actual pounds were first coined in 1817."

In view of the fact that the £1 does not now represent the same definitely predetermined value in gold in England and Australia, it is difficult to see how it can still remain a common money of account as soon as business appreciates this fact. It seems, however, abundantly clear that contracts made in pounds at the time when a £1 was a common unit of account, will not be construed as gold value contracts, but rather as coin contracts, referring to pounds as understood by the law of the place of payment at the date payment becomes due.

In the article from which we have just quoted, Mr. Eder inveighs against devaluation and explains that the assumption underlying modern monetary legislation is that money belongs to the state and not to the citizen. We are not quite happy about this. The position as it appears to us is that money belongs to the

[1] *Georgetown Law Journal*, Vol. XXIII (1935), p. 371.

citizen, but, in England at any rate, it is liable, like any other form of property, to expropriation by the lawful authority of Parliament in the common interests of the people when there is a sufficient necessity. Devaluation is surely a form of expropriation. There is no doubt whatever that the exercise of this authority may be abused and might become dangerous in the hands of a tyrant.[1]

Let us turn now to the first of the recent English decisions to discuss a specific gold clause. On October 27, 1932, Farwell J. decided the case of *In re Société Intercommunale Belge d'Électricité, Feist* v. *The Company* (49 T.L.R. 8). His Lordship held that a promise, made on September 25, 1928, by a Belgian company, to pay to bearer "£100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928" with interest thereon, was an obligation to pay £100 in gold currency, which could be satisfied in 1932 by tendering £100 in paper of legal tender. That is, His Lordship held the contract to be a gold coin contract. This decision was affirmed by the Court of Appeal, Lord Hanworth M.R. and Lawrence and Romer L.JJ. on March 17, 1933. We have remarked elsewhere[2] that this result seemed rather surprising in view of the terms of the contract, but the reason given in each court was that this was the only construction consistent with the Coinage Act 1870. The House of Lords has now reversed these decisions, holding the clause in question to be a *gold value clause* and not a gold coin clause. This being so, it was unnecessary to go into the question of public policy.[3] The view seems to be implied that the question of public policy relates only to gold coin contracts and not to contracts which can be interpreted as gold value contracts. The composition of the House of Lords was the same in *Feist's* case as in the *Adelaide* case, and all the Law Lords

[1] In the illuminating article just referred to, Mr. Eder, at p. 725, cites a letter from Pope Innocent III to King Pedro II of Aragon on this subject, and says: "To the Sovereign power of the prince was opposed the right of the people, sanctioned by the religious and moral authority of the Papacy. The consent of the people became an indispensable requisite to the legality of any alterations of the coinage." Earlier in his article (p. 386) Mr. Eder observes that "the medieval law of money was built up rather on the concepts of Aristotle, whose influence on all scholastic learning was preponderant. The permanent structure of the law as it still largely exists, was developed by the acute mind of St. Thomas Aquinas enlarging on Aristotle's ideas, and by the commentaries on Roman Law of Bartolus whose authority was decisive for centuries."

[2] *Annual Survey of English Law*, 1933, p. 334.

[3] See the note by Professor Gutteridge on this point, *Law Quarterly Review*, Vol. LI. 115.

adopted the opinion given by Lord Russell of Killowen. As we have seen, this opinion has attracted a great deal of attention abroad and has been widely cited on behalf of creditors suing on gold bonds; it is noteworthy that the Court of Appeal adopted the reasoning of the Hague Court in the case of the *Serbian Loans*.

Lord Russell drew two conclusions when arriving at the intention of the parties to the Bond:

"(1) The gold clause was inserted in clauses 1 and 2 of the bond in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date, and (2) that neither party to the bond can have contemplated payment under the bond being actually made in gold coins."

From this it followed that the reference to gold coin of the United Kingdom was not a reference to the mode of payment, but to the measure of the company's obligation. Lord Russell, then, applied the doctrine that a contract should be so construed as to give it business efficacy; even though the contract expressly referred to the law of England it could not be said that, in the circumstances, the parties had intended to submit themselves to possible changes in the law of legal tender in England; any such presumption was rebutted by *the express words of the contract.* The court applied the English rules for the interpretation of the contract, including the maxim that a document is to be construed, "*Ut res magis valeat quam pereat*". The English courts can only give damages in English currency, and so the court ordered the holder of the bond to receive such a sum of sterling as represented the gold value of the nominal amount of each payment, ascertained in accordance with the standard of weight and fineness referred to therein.

The result is a triumphant vindication of the proper law of the contract, and shows that there is nothing in the present law of England to prevent creditors from safeguarding themselves from possible currency depreciation providing they make their intention clear. Nothing short of an express statute, it seems, would nullify the expressed intentions of the parties (Dicey's second general principle). So far, unlike the U.S.A. and Poland and the other countries we have referred to, no English statute has interfered with this aspect of the freedom of contract.

But this is not all. A report will be found elsewhere in this *Year Book* dealing very fully with the case of the *International Trustee for the Protection of Bondholders A.G.* v. *The King* (52 T.L.R. 82). Here again the proper law of the contract was applied, but the case was different from *Feist's* case because here the bonds

were issued by the British Government. Branson J. applied the rule in *Smith* v. *Weguelin* (L.R. 8 Eq.) that "if the English Government were to negotiate a loan in Paris or New York, the English law must be applied to construe and regulate the contract". This reasoning, that a Sovereign is presumed to submit only to his own law, is, it will be recalled, paralleled in *Perry's* case and the *Serbian Loans* case.

The bonds in the *Bondholders'* case were payable either in New York in gold coin, or in London at the fixed rate of 4·861½ dollars to the pound. Following *Norman's* case and the *Bataafsche* case it was held that payment in gold in the U.S.A. was illegal and that the only limb of the contract which was enforceable was that which provided for payment at the fixed rate in England. The contracts were held to be for the payment of gold in the U.S.A. as coin, and not as bullion. At p. 86 the learned Judge said:

"There is no resemblance between the circumstances surrounding[1] the issue of the bond in *Feist's* case and those surrounding the issue of the bond now under construction . . . the gold clause was inserted in that limb of the provision as to payment which relates to payment in New York, not with any special reference to any possibility of the U.S.A. going off the gold standard, but as a customary clause in use in similar contracts in the U.S.A. for some 47 years, the practical operation of which was fully understood."

One might have thought, in view of the terms of the contract, which closely resembled those of *Feist's* case, and of the object of the clause when inserted in the contract, that the clause could have been construed as a gold value clause; but apparently Branson J. thought that the surrounding circumstances of the case entitled him to view the gold clause as a gold coin clause. In view of the American decisions on the point it would seem that there may be reason to say, if the clause in this case is later construed as a gold value clause, that payment of foreign bonds on a gold value basis, in accordance with the *Serbian Loans* and the *Skandia* cases, is not illegal in the U.S.A.,[2] at any rate when the payment is made to non-Americans resident abroad and not subject to the American monetary legislation; in any case, is not the American legislation penal in nature so that an English court

[1] The proper *law* of the contract is ascertained according to the surrounding circumstances of the contract, *v. Jacobs* v. *Crédit Lyonnais*, 12 Q.B.D., 589, cited by Cheshire, *Private International Law*, p. 187. But do the English rules of interpretation permit a judge to consider circumstances surrounding a written contract when finding out the meaning of the contract? Must not the intent be gathered from the words themselves?

[2] In any case a decision on a point of American law is merely one of fact at the time of the decision, and therefore not binding in future cases; *v.* the *Russian Bank* cases, *B.Y.I.L.*, 1933.

may disregard it in accordance with Dicey's second general principle? There is much in *Perry's* case to show that it is presumed that a government does not intend to break faith with its debtors.

The last English case we have before us as we write is *British and French Trust Corporation* v. *The New Brunswick Railway Co.*, 1 All Eng. L.R. 13. In this case First Mortgage Gold Bonds were issued by the Railway in 1884, repayable in 1934 in sterling gold coin of Great Britain of the 1884 standard and value, *in London*. The bond was secured by a trust deed in favour of an American Trust company, and the security covered the whole of the Railway Company's undertaking including realty and personalty. The bonds were either bearer, or registered. Hilbery J. held that the bond was "impressed with the character of a bond for the repayment of £100 sterling", and that it was for the payment of gold coin, and not, as in *Feist's* case, for the payment of gold value. The reason for distinguishing *Feist's* case was that there the parties actually contemplated that this country was likely to go off gold, and that neither party contemplated payment in gold coins.

Hilbery J. (at p. 19) said:

"Every one of the considerations which lead to what Lord Russell called a construction which strained the words given to the Bond in the *Feist* case, is absent in the case before me. If their presence alone led to the construction which was put upon the clause in *Feist's* case their absence in the present case would at least seem to leave no reason for doing violence to the natural and ordinary meaning of the contractual words. . ."

There is, however, as we have seen, important foreign authority to show that the American legislation does not affect contracts payable outside the U.S.A. Further, there is no mention in Hilbery J.'s judgment of any argument that the Bond was a New Brunswick bond, and that as it covered both real and personal property and ought therefore to be considered an immovable in that State, New Brunswick law should govern the obligations under the bond. Debts secured on land have been held to be immovables.[1]

It is possible that both the *Bondholders'* and the *New Brunswick* cases may be appealed against in the near future.

V. *Conclusions*

It is perhaps hazardous to venture any general conclusions in view of the unsettled state of English and foreign authorities, but the following points occur to the writer:

1. The use of the term "pound" or "dollar" without further

[1] *Re Hoyles*, [1911] 1 Ch. 179; cit. Cheshire, *Private International Law*, pp. 317 and 319; Dicey, p. 58

words of explanation does not of itself imply an obligation which must be discharged in gold.

2. The gold value clause does not appear to be contrary to English public policy; but an English Statute might make it so.

3. The United States monetary legislation is probably territorial in its operation, but there is still some doubt how far it affects foreigners.

4. The English courts attempt, in all cases invoking a gold clause, to apply the ordinary rules of private international law which include the presumptions that a Sovereign submits only to his own law, and that the *lex loci solutionis* governs the legality of the discharge of any obligation.

5. The English courts apply English rules of interpretation once the proper law of the contract is ascertained; these rules include the maxim of construction "*ut res magis valeat*".

6. The English courts are paying more and more regard to foreign precedents which are of considerable persuasive authority in private international law matters.

In conclusion, we may say with Nussbaum[1] that the solution of the problems raised by the gold clause is to be found in the ordinary rules of private international law.

[1] *Op. cit.*, p. 54.

SANCTIONS UNDER THE COVENANT

By SIR JOHN FISCHER WILLIAMS

WHATEVER may be the outcome of the action taken under the auspices of the League in connexion with the Italo-Ethiopian conflict, the importance of that action as a fact in the history of international relations will in no competent quarter be disputed. This is the first time in human history that a general attempt has been made by a large number of states great and small, united in a society, to enforce obedience to an international obligation accepted by another state, by the use of measures which that other state has already by treaty agreed to in the event of the violation of the obligation.

The Armed Neutrality of the eighteenth century was a proceeding by a small number of states to enforce as a rule of international law a principle which had not been accepted by the state against which action was to be directed.[1] Action by the "Holy Alliance" or by the Great Powers or by the "Concert of Europe" was of a different character from action under the Covenant of the League of Nations. Such action, though it may often have been taken on behalf of the maintenance of peace and in the interests of the international community, was action by certain Powers alone after consultation among themselves; the opinions of the smaller states had not been taken, and the object of the action was frequently not the mere enforcement of an international engagement but the fulfilment of a policy of a peaceful change. In all—or most of—these earlier cases it was open to the state against which action was directed to dispute the existence of the obligation sought to be enforced. To use the language of the old technicalities of English legal procedure, the defendant state could have replied to the declaration of the plaintiffs by a demurrer; in the present case the Italian defence does not and could not include a demurrer; the Italian Government does not dispute the binding character of the Covenant or of Article 16; what it does say is that on the facts it has not done anything which authorizes the enforcement of that article against itself. Action is being taken to enforce an undisputed international obligation; the question at issue is not as to

[1] It may be permissible in a footnote to record the reaction of an Englishman of mark to the Armed Neutrality. "As to the neutralities, I really think the Russian virago an impertinent puss for meddling with us." Cowper, Letters (*Works*, 1837, xv, 73) quoted in the *Oxford English Dictionary*.

the legal validity of the obligation nor as to the right to enforce it if it has been violated, but whether there has been a violation in fact. It is not the purpose of this article to discuss that question.

The issue in the Italo-Ethiopian case, it is hardly necessary to remind a reader, is different from that which arises when it is proposed to take steps to restrain a violation of international law, such as a breach of a treaty, when no specific measures have been prescribed in advance or assented to beforehand by the violator. We are still far from having any recognized procedure of "Sanctions" for treaty violations generally. Indeed, it is manifest that violations of treaties differ widely in gravity and cannot all be dealt with by similar action. If all breaches of treaties are to be sanctioned, we must have the equivalent of an international legislature—an international organ, that is, with power to revise treaties—or at the very least a tribunal armed with some doctrine analogous to that of "public policy" in English law and permitting unwise treaties to be declared void.

Article 16[1] is usually described as the "Sanctions" article, but it is to be observed that neither the word "sanction" nor any word such as "penalty" or "punishment" occurs either in the article itself or elsewhere in the Covenant. The forms of municipal criminal law are not reproduced in the Covenant. The *sanctio* of Roman law, with its originally religious association,[2] that part of the law

[1] It will be convenient here to give the exact language of Article 16 of the Covenant:

"1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state whether a Member of the League or not.

"2. It shall be the duty of the Council in such a case to recommend to the several governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

"3 The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking state, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

"4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon."

[2] See Strachan Davidson, *Problems of the Roman Criminal Law*, Vol. I, pp. 3, 10

which "*certam poenam irrogat iis qui preceptis legis non obtemperaverint*",[1] has no express place in the governing text. For the Covenant is a contract, not a legislative measure taken by a sovereign authority; it would have been inappropriate in such an instrument to follow the arrangement which an old commentator tells us is the proper construction of a law (*legis sunt tres partes, pro-oemium, capita, sanctio*),[2] and insert a third division with "Sanctions" for its title.

Nor is this a mere matter of arrangement and style. The essential purpose of the first three paragraphs of Article 16 is to support, *sancire*, the qualified prohibition of a resort to war which the earlier articles of the Covenant contain, not by the infliction of a punishment for a completed contravention, and still less by giving a reward for the observance of the Covenant (the so-called "remuneratory sanction"), but by the prevention in any particular case of the success of the action prohibited. The prevention aimed at is primarily that which is to be achieved at once, in relation to the particular offence, and only secondarily the prevention of other offences of the same character to be reached by the deterrent influence of example. In municipal law this is otherwise; in that law it is only in exceptional cases—perhaps the penalty imposed on persons "found (in certain circumstances) in possession of housebreaking instruments" may be instanced—that a specific sanction is imposed for the prevention of what is taken to be a contemplated or a partially executed offence.[3] As a general rule, the sanction preventive of the offence which is actually in course of accomplishment is to be found in the duty of the constable to intervene actively against the offender and of the private citizen to assist the constable. The prevention which is an element of, and perhaps the main justification for, punishment in municipal law, is the prevention of the similar act in the future. This latter element is not absent from the Covenant, and indeed the successful prevention of the immediate act will tend powerfully to discourage attempts at similar acts, but Article 16 prescribes in terms no punishment for an act of a resort to war, such as municipal law provides for a criminal offence, when once that act has been done and carried through. If such a punishment were to be decided upon by Mem-

(Oxford, 1912). According to Lewis and Short's Latin-English dictionary, *sanctio* is a "decreeing as inviolable under penalty of a curse".

[1] *Digest*, XLVIII, 19, 41.

[2] Godefroi on the above text of the Digest (1628).

[3] And all imprisonment is a preventive sanction against the offence of breaking prison.

bers of the League, they would be developing rather than executing the Covenant. Article 16 is aimed at preventing the success of the prohibited resort to war. If that prevention is successful, it will produce an effect on the international conduct of states in the future. But that ulterior effect is not the main object of the article.

It has become usual to speak of aggressive war as an "international crime"—a form of speech resulting from the justified sentiment that in modern conditions a resort to war is an outrage against humanity when it is not the mere acceptance of a condition forced upon a state by active aggression. But there is a danger that the word "crime" may lead those who use it to unsound conclusions. International law does not distinguish between actions by states that are wrongful in relation to the whole of international society and therefore analogous to crimes, and actions that violate only the rights of individual members of society. Crime is a concept of municipal law and is admitted into international law only as a qualification of certain acts by individuals, such as piracy; this admission, indeed, is in the nature of an exceptional provision or even an anomaly if the classical doctrine that international law is concerned only with the actions of states is to be rigidly maintained. "Crime" even in municipal law is, as a general rule, applicable only to the actions of natural persons; the composite person, the body corporate, cannot be possessed of that guilty mind which is still in general an essential element of crime.[1] That "general will", of which guilt or innocence might properly be predicated, is the creation of the philosopher or the publicist, but not of the lawyer. Burke spoke for civilized humanity when he told the House of Commons that "You cannot indict a nation"; we do not now admit that the total destruction of the Amalekites can have been the command of a righteous God. We can conceive—learned and humane men have done so—that it may be just to amend the law by making punishable the conduct of individuals who in places of authority have been responsible for the entry of their nation on a war that is illegal, but international law does not at present admit —and it is devoutly to be hoped that it never will admit—the idea of the punishment of a nation. Collective *pœnal* responsibility for misdoing is a tenet of primitive law for which international law, even if it be a young law, has no place.

This is not the place in which to attempt an exhaustive commentary on the text of Article 16, but it may be well to discuss

[1] See, however, Dr. Stallybrass in *Law Quarterly Review*, Vol. LII, p. 60.

briefly the interpretations given by the proceedings of the Members of the League to a text which by its very simplicity leaves some important points to be decided when action has to be taken upon it. A list of such points—or at any rate of those points which have been the main subjects of general discussion—would include the questions: (*a*) How far has the action of the League to be "general" or "collective"? (*b*) Is unanimity on the Council a necessary preliminary to action by the Members of the League, and, if so, at what point? (*c*) What is the limit of the action that Article 16 prescribes? How far is it compulsory? On these points and indeed on the whole question of the action to be taken, the Members of the League in their handling of the Italo-Abyssinian dispute were guided by the "Resolutions concerning the Economic Weapon, adopted by the Assembly on October 4th, 1921",[1] though they did not follow them slavishly.

The solution given to the question how far the action must be general or "collective" has not been made the subject of any single definite pronouncement; rather, *solutum est ambulando*. No discussion on this point took place at Geneva, and counsel was not darkened by an introduction of the legal doctrines of the distinction between the "joint and several", or the "joint" covenant —doctrines indeed which if they were sought to be imported wholesale from English into international law would have done little to solve the practical question. For when a covenant is joint, English law nevertheless allows performance of the whole obligation to be exacted from one only of the covenantors, provided that the procedural step is taken of making his co-covenantors also parties to the action brought to enforce the covenant; the failure of one joint contractor is no excuse for the others.[2] Manifestly, however, it would be an outrage on common sense in dealing with an international document of this character[3] to insist that each individual

[1] See *post*, pp. 148–9.

[2] The Law Officers of the Crown, consulted in 1870 with reference to the Treaty of 1839 guaranteeing the Neutrality of Belgium, pointed out that, while if the treaty was interpreted by the rules of English law the obligation was joint and not joint and several, this distinction was unimportant inasmuch as under that law any one party to a joint guarantee could be made liable for the performance of the whole obligation, provided only that the other guarantors also were sued; they thus concluded that the failure of one or more of the guarantceing Powers would not excuse the remaining guarantors. But "Whether in the event of none of the co-guaranteeing Powers choosing to co-operate with us, Belgium could reasonably expect Great Britain to undertake single-handed a war against great Continenal Powers is a question into which other elements enter than the strict construction of the treaty, and on which we do not presume to give an opinion." (*ex relatione* Professor McNair.)

[3] "*Le maître de Salamanque* (François de Vitoria) *a eu l'inappréciable mérite de*

Member of the League was bound to take action by itself, no matter what other Members might do, once it reached the conclusion that there had been a resort to war in violation of Article 12, 13, or 15 of the Covenant. It may even be argued that a Member of the League is not merely not bound to take separate action but is even, in spite of the language of Article 16, not entitled to do so if it is practically alone in its opinion. Thus, the Secretary-General of the League reported to the Council in May 1927[1] that "it would be a misapplication of the Article, which would not be tolerated, if a Member or group of Members should claim to act under it on this account in defiance of the general sentiment of the League".

The meaning and effect of a "collective guarantee"—the phrase used in the Treaty of London of 1867 by which the neutrality of Luxemburg was protected—was discussed in this country when that treaty was signed. The British official view on that occasion is generally taken to have been the doctrine proclaimed in the House of Lords by Lord Derby, then Prime Minister, on June 20 and July 4, 1867, that (1) no single guaranteeing Power was bound in the event of a breach of the neutrality to take up arms alone if the other guaranteeing Powers did nothing, and (2) that a breach of the neutrality by any one guaranteeing Power absolved all the others from any legal duty of enforcement. It is, however, to be remarked that Lord Stanley, then Foreign Secretary, speaking in the House of Commons on June 14, 1867, affirmed the first of these propositions without discussing the second; similarly Lord Clarendon, speaking after Lord Derby in the House of Lords on June 20, expresses approval of the first point but does not mention the second. The second proposition indeed has generally not been accepted by international lawyers and cannot be relied on as an interpretation of the obligations imposed by a "collective guarantee". It would in fact reduce the whole obligation to a nullity. But the propositions (*a*) that one guaranteeing Power is not bound to act alone, and (*b*) that the general body of guaranteeing Powers is bound to act notwithstanding the failure of a certain minority, give a real and reasonable meaning to the word "collective", are an obvious expression of what may be

montrer que les questions internationales ne doivent pas être examinées uniquement sous leur angle juridique." (Politis. *La Neutralité et la Paix.* Hachette, 1935, p. 6.)

"The interpretation of international contracts is and ought to be less literal than that usually given in English courts of law to private contracts and Acts of Parliament". (Westlake, *International law*, Vol. I, p. 282, 1st ed.)

[1] C. 241. 1927. V.

called political common sense,[1] and may furnish a sound interpretation of the duties imposed by Article 16 of the Covenant.

How on any particular occasion the "general sentiment" of the League—to use the language of the Secretary-General—is to be ascertained, cannot be settled beforehand by any precise or formal definition. A "general sentiment" is not the same thing as a unanimous sentiment. Nor, on the other hand, is it the same thing as the sentiment of a bare majority—especially in an international assembly the units of which differ so widely in all the elements that give weight to a vote. It would be misleading to say that any particular fractional majority—two-thirds or three-quarters—is the test of a "general sentiment".

On the occasion of the Italo-Abyssinian dispute there could be no question what was the general sentiment of the League. The fact that Austria, Hungary, and Albania did not express affirmatively the view that Italy had resorted to war in disregard of her covenants clearly did not prevent the sentiment of the other Members of the League from being properly described as "general". In these conditions it was a fair conclusion that all those Members of the League who shared in the "general sentiment" were bound to fulfil their obligations under Article 16; if so bound, they were also entitled to take action in the name and on behalf of the League and thus by collective action to make a reality of what is now usually described—the phrase does not occur in the Covenant—as "collective security". But this binding obligation and this international right result, in the system now adopted at Geneva and based on the Assembly Resolution of October 1921, not from a merely mechanical or "automatic" application of the text of Article 16 but from the decision which each Member has to take for itself on the question whether a breach of the Covenant has been committed.

This brings us to the second of the questions formulated above—the question of unanimity in the Council and as to the part to be played by the Council.

In the many discussions of the practicability of action under Article 16 which took place before October 1935, it was not uncommon to find the view expressed that action could only be taken as a result of a decision of the Council, or even of the Assembly,

[1] See Oppenheim, *International Law*, 4th ed., Vol. I, § 576; Hall, *International Law*, 8th ed., p. 401 (note); Hansard, 3rd series, Vol. 187, p. 1922, and Vol. 188, pp. 151 and foll. and 968 and foll. *See also* Sanger & Norton, *England's Guarantee to Belgium and Luxemburg*, London, Allen & Unwin, 1916.

that such a decision must be unanimous, that there is no provision in Article 16, as there is in Article 15, for disregarding the vote of a party to the dispute, and that therefore, especially in any case where the conduct of a member of the Council was to be condemned, the League must be helpless. Neither the letter nor the spirit of Article 16 gives any support to that view. The first paragraph of the article makes no reference to the Council. The second paragraph limits the duty of the Council to "recommending" to the governments the contributions which they are to make to "the armed forces to be used to protect the covenants of the League"—if such forces are in fact necessary. But "recommendations" of the Council, not being "decisions", may be made by a majority and do not require unanimity.[1] The third paragraph does not mention the Council. The fourth paragraph deals with the expulsion of a Member and may for our present purpose be left out of account. At the same time the resolutions of 1921 recognize and express the obvious truth that action realizing the "general sentiment" of the League must be co-ordinated and regulated by the Council, and indeed those resolutions indicate that the Council, as the executive organ of the League, must initiate and assume responsibility for the action to be taken in its name. The resolutions of 1921 may even in some respects be thought to have erred in the language chosen for the statement of the function of the Council and to have contributed to the false impression that a resolution of the Council was necessary to set in motion the machinery of Article 16.[2]

Be this as it may, the procedure followed in the autumn of 1935 was in strict harmony with the view that it was no part of the functions of the Council to determine by resolution that there had been an illegal "resort to war" by a Member of the League. The Council at its meeting on October 7 had before it the report "containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in relation thereto" which had been made under Article 15 (4) of the Covenant. It had also a report of a Committee of six of its members expressing the conclusion that "the Italian Government had resorted to war in

[1] This is well settled as to recommendations of the Assembly and though there seems to have been no formal pronouncement as to the Council, it is surely impossible to interpret Article 5 of the Covenant differently in relation to the Council and Assembly respectively. See the writer's *Chapters on Current International Law and the League of Nations*, Ch. XIII, and *American Journal of International Law*, Vol. XIX, p. 475.

[2] Thus Resolution 6 begins with the words "If the Council is of opinion that a state has been guilty of a breach of covenant".

disregard of its covenants under Article 12 of the Covenant of the League of Nations".[1] The President of the Council then called for the expression of the opinions of the members of the Council as to the conclusion expressed by this committee. Each member separately gave his opinion, and every opinion, except that of the Italian member, concurred in the committee's conclusion. The opinions thus given were not a decision of the Council, requiring unanimity for its validity, but separate expressions of the view taken by each individual Member of the League; they were the answers which individual Members in their unfettered discretion gave to the question whether Italy had resorted to war "in disregard of its covenants under Article 12".

The President of the Council then took note, not of any resolution or decision by the Council, but of the fact that "fourteen Members of the League of Nations represented on the Council consider that we are in presence of a war begun in disregard of the obligations of Article 12 of the Covenant".[2] He also stated that the report of the Council Committee (of six) and the minutes of the present meeting of the Council would be sent to all Members of the League, and reminded his colleagues of the terms of the resolution of October 21, 1921. He added that "the Council has now to assume its duty of co-ordination in regard to the measures to be taken".

Here we have what is in truth a necessary development of the Covenant. The text of that instrument is silent as to any general duty of co-ordination by the Council. The Covenant speaks only of recommendations by the Council as to military and other forces "to be used to protect the covenants of the League". But plainly the action to be taken under the first paragraph of Article 16 must be co-ordinated, and it is primarily the duty of the Council, clearly implied in the constitution of the League, to undertake the task.

This is the first development. But this is not all. A second development follows, less clearly implied in the text but of even greater importance in the history of League procedure. The Assembly is never mentioned in Article 16, but the growing strength and cohesion of that body has involved as a matter of constitutional growth that it must be called upon to play a part on the occasion of a crucial step. The President of the Council therefore concluded his statement by saying that "since the Assembly . . . is convened for the day after to-morrow . . . . my colleagues will doubtless feel

[1] See the report in *The Times* newspaper, October 8, 1935.

[2] A. 78, 1935, Vol. VII, pp. 9 and 10 (*ubi supra*).

it desirable to associate the Assembly with this task. The report of the Council Committee and the minutes of the present meeting will therefore be communicated to the President of the Assembly."

Proceedings in the Assembly followed closely the precedent set by the proceedings of the Council. There was no formal resolution of the Assembly. On this express ground an Italian objection to the procedure—an objection based on the absence of unanimity—was overruled. But each delegation recorded its concurrence or dissent from the opinions expressed by the fourteen members of the Council, concurrence of a delegation being in some cases inferred "on the principle that silence is assent"; the only dissent recorded was that expressed by Austria and Hungary in addition to Italy, with the adhesion, subsequently made clear, of Albania. After individual opinions had been thus expressed, the Assembly "recommended" (and be it remembered that for a "recommendation" a majority vote suffices) that Members of the League, other than the parties, should set up a committee of one delegate for each Member, assisted by experts, to consider and facilitate the co-ordination of such measures as they might severally contemplate. Hence arose the Co-ordination Committee with its offspring of sub-committees whose proceedings may be followed in the records of the League and need not now for our present purposes detain us. But as a pronouncement of weight on the constitution of the League the declaration of the President of the Assembly should be firmly fixed in the public mind:

"It must be made clear that no organ of the League has power to decide, in such a way as to bind all the Members, that one of them has violated the Covenant. That obligation derives directly from the Covenant, and must be observed by Members of the League in virtue of the respect due to treaties . . . .

"As regards any doubts concerning the vote upon the text in question, I think that our Italian colleague would be entirely in the right if that text constituted a formal resolution of the Assembly. In that case, the question of a majority vote or unanimity vote would arise. I was anxious to make it clear at the outset that, in the present case, this is not a resolution, in the strict sense of the word, but an invitation addressed by the Assembly to the states members."

Thus, to sum up, the starting-point of League action is the individual and separate expression of opinion by each member of the League. If there is sufficient agreement in these opinions to indicate that the "general sentiment" of the League is in favour of action, the states that have expressed these individual opinions are entitled and bound to take action. But this must be common action on behalf of the League. And it must be co-ordinated by action of the League.

In this way the imagined difficulty of unanimity was found to have no real existence and the fear that the League as a "superstate" might claim to dictate the policy of its Members proved groundless. And two other obstacles—or what were sometimes thought to be obstacles—to effective action by the League were taken rapidly at a gallop, if the expression may be pardoned, by the League. *First*, there proved to be no need to define "the aggressor" or "aggression"; Article 16, in fact, never uses either word. Italy was not declared to be an "aggressor". She was found to have "resorted to war" contrary to the Covenant. That is all and that is enough. *Second*, the word "war" gave no trouble. There was no nice consideration given to the question whether in the absence of a declaration of war the Italian proceedings were evidence of an *animus belligerendi* and whether in the absence of such an *animus* there could be a resort to war in the somewhat esoteric sense in which international lawyers have sometimes used the word. President Roosevelt on October 5 had already proclaimed that "a state of war unhappily exists between Ethiopia and the Kingdom of Italy", and no one at Geneva suggested that his view of the facts was erroneous. One of the uncertainties which contributed to ensure a cautious handling of the Sino-Japanese dispute over Manchuria was absent in this case. The Committee of Six, reporting on October 7, 1935, felt no hesitation in reaching the same conclusion as the President of the United States.

Such, then, were the steps by which the Members of the League reached almost unanimously the conclusion that a case had arisen in which the provisions of Article 16 had to be applied. We have now to consider what are the measures which Article 16 prescribes; what are the "sanctions" which this part of the Covenant makes it legitimate or necessary to impose upon the wrongdoer? How far is the action prescribed compulsory on Members of the League?

The Article opens with the declaration that the offending state is deemed *ipso facto* to have committed an act of war against all other Members of the League. This is in terms the widest possible legitimation of all action, including a resort to war by the Members of the League. It would, however, be desirable that any such resort should be by "collective" action. War in support of the Covenant of the League should, if possible, have the authority of the League. War by one or two states alone on their own initiative on behalf of the League is as little encouraged by the Covenant as

separate economic or financial action by one or two states alone.[1] This is not merely a result derived from the general implications and spirit of the Covenant. Article 16 (2) contemplates that war in defence of the Covenant should be regulated by the Council; whether the authority of the Council is a condition precedent to an entry on war by a Member of the League against another Member which has resorted to war in violation of the Covenant is another question. The assumption is usually made that this authority is not required.[2] If it is required it must take the form of a recommendation. To insist on unanimity would be to risk the destruction of the practical usefulness of this part of the Article.[3]

When proposals for a forcible intervention in the Ethiopian war, such as the interruption of communications between Italy and Africa—the operation often referred to as "closing of the Suez Canal"—are brought forward, it is under this declaration that the covenant-breaking state is deemed to have committed an act of war, and under these limitations that it is possible in the writer's opinion to find legal justification for such action of a warlike character. But warlike action is optional for the League and its members, not compulsory; it is not the subject-matter of the Resolutions of 1921, which are limited to regulating the use of "the economic weapon", and it is clearly desirable that war, even legitimate, should if possible not be invoked as a means of preventing a resort, even illegitimate, to war. As the Resolutions of 1921 themselves put it: "it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure". But if a resort to war is thus optional, there is a clear obligation, binding on those states which hold that there has been an illegal resort to war, to take other measures under the Article.

We need not here enter on a discussion of the interpretation to be given to the text of the Article as if it were a dry problem of law to be solved solely by a study of the language used. The general lines of interpretation, if indeed that is the right word, have been fixed, for the time at any rate, by the action taken by the fifty odd

[1] See *ante*, p. 135.

[2] See, for example, No. 3 of the "Resolutions regarding the Economic Weapon", *post*, p. 148.

[3] How far this limitation may conceivably be affected by the Briand-Kellogg Pact must not be here discussed. But it may be assumed that the offending Member has itself violated that Pact and is therefore no longer entitled to claim the performance of the obligations of the other contracting parties under that instrument.

states concerned—an action guided, as already stated, by the Assembly resolutions of 1921. Such an action is in itself an interpretation—an interpretation both of the original text and of the resolutions. The Members of the League must be taken to have done what they understood they were at liberty to do in fulfilment of their obligations. No state has challenged their action. Italy has not contended that if the original decisions of the states which impose sanctions were right, their subsequent actions were not authorized by the Article.

The Members of the League have in fact not followed or attempted to follow all the proposals made in the resolutions of 1921—thus, for example, at the time when these words are written there has been no severance of diplomatic relations—but they have conformed to the general scheme and spirit of the resolutions by applying economic sanctions gradually and in accordance with a common plan. They have not interpreted the article as imposing upon each Member the difficult obligation of severing at once "immediately" its own trade and financial relations with Italy and preventing all intercourse with Italy by its own nationals and "the nationals of any other state whether a Member of the League or not", without first previously ascertaining the probable action of other Members. Further, they have corrected what is in truth an error in the drafting of the article, and have made the residence and not the nationality of individuals the criterion of the applicability of restrictions; an Italian national resident in Great Britain has not been cut off from communication with his neighbours, and British subjects resident in Italy have not been asked to cease purchases in the local market. An amendment aimed at correcting the text of the article in this respect was in fact passed by the Assembly in 1921, as part of the action then taken, but for some unexplained reason has not received the necessary ratifications to become incorporated in the Covenant. And perhaps the main example which the Members have given of their acceptance of the inevitable "gradualness" of the practical administration of the Article is that they have not, at the time when these words are written, passed on from action taken in their own territories to the interruption of all or any Italian communications with the whole outer world by the imposition of a blockade at sea or by the declaration—by a sort of analogy—of certain articles as contraband of war. On this point the language of Article 16 is categorical. If it is not obeyed, the plea must be a plea of confession and avoidance on the ground that the action prescribed is either impossible

or would certainly not achieve the end desired. Such a plea depends for its plausibility on the fact that all the great Powers of the world are not Members of the League. We are here in the domain of fact, not of pure law. The necessity for gradualness or even abstention results not from the resolutions of 1921 nor from administrative necessities internal to the League.

The exact legal position of the resolutions of 1921, apart from the confirmation given by the action taken in the Italo-Abyssinian dispute, is a fair subject of discussion, but like some other important problems of international law it is improbable that it will ever be brought to the test of a legal decision. The resolutions themselves are described in their own text as "rules of guidance which the Assembly recommends, as a provisional measure to the Council and to the Members of the League in connexion with the application of Article 16". "Provisional" would seem here to mean "so long as the amendments to Article 16 are not in force", but, if so, it would seem that the "provisionality" does not apply to so much of the resolutions as is not covered by the amendments, and in fact the whole application of the principle of gradualness is not so covered. The Assembly had no authority to modify the text of the Covenant nor were the representatives of the Members of the League at the Assembly of 1921 commissioned either to negotiate, or to sign or to ratify a new treaty affecting the international engagements embodied in the Covenant. The resolutions are, therefore, not of equal authority with the text of the Covenant. On the other hand, when all the Members of the League at a meeting of the Assembly give each other and the world at large to understand that they interpret their obligations under the Covenant in a certain way and propose to guide themselves in the execution of those obligations accordingly, it is difficult not to treat them as bound by their own declaration. To hold otherwise is to deprive a solemn act of all its meaning. If appeal has to be made to a legal principle to justify this view, the analogy of "estoppel" in English law[1] may perhaps be invoked. For each Member may be understood to have taken note of the declarations of its neighbours and guided its policy accordingly. In international relationships the guidance of policy is the equivalent of that doing, or abstaining from doing, on the faith of the acts, omissions, or words of another person which in English law is the necessary element to justify reliance upon an estoppel *in pais*.

[1] The nearest French equivalent would appear to be *empêchement*. But the writer is not in a position to discuss the doctrine of French law.

Thus, the obligations of states which are Members of the League at the date of the resolutions are affected by the resolutions, if and in so far as those states express no dissent and treat them as factors in their policy. And states which join the League after the date of the resolutions must be taken to have notice of the public declarations already made and never disclaimed as to the interpretation of the text of the Covenant, and to come into the League upon the footing of the validity of those declarations.

If it be objected that this is in fact to allow the Covenant to be amended by a procedure not contemplated by its text, the answer is that the history of law—at any rate of English law—in its earlier stages gives many examples of the successful use of devices for law reform by the action of subordinate authority when the sovereign legislature for one reason or another was unable to supply the amendment which contemporary conditions required. There is no cause for alarm or even for serious criticism when international law (in whose sphere a sovereign legislature is either absent or, in such partial jurisdiction as is possessed by the League, slow and cumbrous in its proceedings) follows the analogy of municipal law reform.

It is, however, well to emphasize that, if the resolutions of 1921 are directed to securing the execution of the obligations of Article 16 in a practical and reasonable way and as far as possible by pacific methods, they do nothing to weaken the essential obligation of the article, which is to prevent the success of an illegitimate resort to war by a Member of the League. If, in the practical application of the article, this essential obligation is not fulfilled, then, as against a complaint by a state which suffers by that failure, the resolutions of 1921 do not afford a defence, nor is it open, it is hardly necessary to add, even to all the other Members of the League after events requiring the fulfilment of the obligation have taken place, to "interpret" that obligation away. If such a failure were to occur and had to be defended, the defence must take the line either that performance was wholly impossible or, perhaps, that any further attempt at performance would involve evils so great that it would have been unreasonable and improper to require it.

As to the distinction between economic and military measures, Article 16 does not fix any gulf between them. The Article does not in paragraph (1) use the adjective "economic" to describe the measures which must be taken thereunder by those Members of the League who hold that there has been an illegal resort to

war, though it does speak in paragraph (3) of "the financial and economic measures which are taken under this article". Nor must all the measures mentioned in the first paragraph be taken by all such members. A naval pacific blockade can only be carried out by Powers possessing a fleet, though it would be well that all Powers possessing even the smallest fleet should co-operate. And such a blockade though economic in its effect is not purely economic in its methods. The distinction which runs through the article is rather between the measures which *must* be taken and the measures which *may* be taken, the latter being the contribution of military, naval, or air forces, and they are the subject of recommendation only, not command, by the Council. In fact, however, the measures that *must* be taken may well result in a compulsion to take the measures which, so far as the text goes, only *may* be taken. For it may become imperative to support purely economic action by military action—and this is what paragraph (2) and parts of paragraph (3) contemplate. And one batch of economic measures may call for further economic action so as to prevent an unfair distribution of the burden of sanctions-enforcement—and this is what other parts of paragraph (3) envisage.

To pass now from questions of interpretation to a broader and more general consideration, we may glance briefly at the relations of Article 16 to the doctrine of neutrality.

It may be a matter of dispute how far the existing international system to which all states belong deserves to be called a "Society", but there can be no doubt that the League of Nations is entitled to take the name which the French text of the Covenant gives it—"Société des Nations". And the members of a society, a *société*, however loose its ties may be, cannot properly be wholly indifferent in a quarrel which arises out of, and indeed is, a violation by one member of one of the chief rules in the constitution of the society. The impropriety of such indifference, which indifference is of the essence of the conduct which international lawyers call "neutrality", would be manifest even if the Covenant, like the Pact of Paris, were wholly silent on the point, but where, as in the Covenant, there are express provisions for action by the Members of the League against one of their number who is a belligerent in violation of his contractual agreement, it is obvious that the rule of neutrality has no force to limit the execution of those provisions. Mr. Eden on October 23, 1935, declared the view of the British Government in the United Kingdom:[1] "They did not con-

[1] Report in *The Times* newspaper, October 24, 1935.

sider that any covenant-breaking state had any legal right to require observance by other Members of the League of any of the laws of neutrality." At the same time the British Government was at that very moment, as Mr. Eden explained, observing towards Italian warships and auxiliary vessels a rule of The Hague Convention No. 13, the title of which is "Convention respecting the Rights and Duties of Neutral Powers in Maritime War". From this the inference might be drawn that as a matter of policy, though not of obligation, the rules of neutral conduct which exist outside the Covenant, would be observed by this country and probably by other Members of the League during the enforcement of Article 16, except in so far as those rules are in direct conflict with the action taken under that article. And it may further be argued that as the article allows a covenant-enforcing Power to become belligerent without any violation of the Covenant, a Member of the League cannot justly complain that an international legal duty is disregarded if a partial advantage, such as a step in contravention of generally accepted rules of neutrality, is taken of this liberty.

If, however, it is true that a Member of the League cannot properly make such a complaint, the application of any such doctrine to a state which is not a Member is far more doubtful.[1] A Member of the League is authorized and required by the Covenant to cut off by maritime blockade the foreign trade of a covenant-breaking state, and that without the assumption of the status of a belligerent. How far is such a blockade enforceable against vessels flying the flag of a non-member of the League? If it be regarded as a pacific blockade of the kind enforced on several occasions in the nineteenth century, the generally received opinion is that the rights of a non-member of the League are not affected. But does not a League blockade enforced against a member state differ in one important respect from the old pacific blockade? The old pacific blockade was a measure taken *in invitum* against the Power blockaded without any previous acceptance by that Power of the instrument authorizing the action. But a League blockade is authorized by the Covenant of which the blockaded Power is itself a signatory. If, therefore, the blockaded Power has itself agreed that its communications with third Powers may be cut, have those third Powers a separate right, independent of the authorization of the blockaded Power originally given, to insist on

[1] This subject and the whole question of pacific blockade will be found discussed in a League document—C. 241, 1927, V.

keeping those communications open? How far can a third Power insist on breaking the bonds the imposition of which by other Powers the blockaded Power itself authorized? The matter may be open to discussion. And it is clear that, apart from any question of general international law, a difficult issue of policy will arise for decision by the third Power.

The issue might perhaps be presented under another guise than that of blockade, if what was wanted was not so much to intercept all communications—a policy involving possibly great hardship to the whole population affected—as to cut off the supply of some article, such as oil, especially useful in warfare. The Members of the League engaged in enforcing sanctions might declare that particular commodity to be contraband of war and claim the right to stop vessels conveying it, taking them into port and discharging the particular cargo. It might even be part of the policy thus pursued to purchase the contraband commodity, when intercepted, at its market value. There are precedents for such action in British maritime history. Possibly the Powers affected would challenge the action; if so, the policy might prove impracticable.[1] Doubtless, such action would be an innovation, a notable expansion of existing law. According to existing law a declaration of contraband must be made by a belligerent, not by a state which is not formally at war. But such a declaration could hardly be called a revolutionary break with the past. It would be rather in the nature of an evolutionary development. For *ex hypothesi* a war is in progress contrary to an express treaty obligation, and the League Powers might be considered to be making the declaration of contraband on behalf of and as quasi-trustees for the belligerent who had not wrongfully resorted to war—the assumption being always that the declaration of contraband is not in itself unreasonable, not an undue extension of the category of things directly useful for and used in the conduct of hostilities.

How international law and custom in this matter may develop is a matter of speculation rather than of prophecy. There are some Members of the League—notably Switzerland, as M. Motta explained in a moving speech in the Swiss Federal Assembly on January 28 last—whose international situation, moral and material, requires a special interpretation of their duties under the Covenant. But we may conjecture—we cannot be sure—that the coming generation may emphasize neutral duties rather than neutral rights and that there may be wars where not "to take

[1] See *Can we be Neutral?* (Harpers, New York, 1936), p. 60.

sides", in thought if not in action, may be impossible for any man who recognizes the claims of morality. For when a world-wide conflict is in progress, if it is not a mere "dog-fight" but a struggle in which great moral issues are at stake, neutrality though it may be respectable is not widely respected.

The vehement spirit of the great Italian poet poured special contempt on the angels who in heaven's warfare were only for themselves; indeed those angels committed not only the crime of failing to defend the right but the blunder of not recognizing what was required by a proper understanding of their own interests, and they suffered accordingly. Their fate, we may conjecture, would have been approved not only by Dante but also by Machiavelli.

ANNEX I

Resolutions Regarding the Economic Weapon

Adopted by the Assembly on October 4, 1921

1. The resolutions and the proposals for amendments to Article 16 which have been adopted by the Assembly shall, so long as the amendments have not been put in force in the form required by the Covenant, constitute rules for guidance which the Assembly recommends, as a provisional measure, to the Council and to the Members of the League in connexion with the application of Article 16.

2. Subject to the special provisions of Article 17, the economic measures referred to in Article 16 shall be applicable only in the specific case referred to in this article.

3. The unilateral action of the defaulting state cannot create a state of war; it merely entitles the other Members of the League to resort to acts of war or to declare themselves in a state of war with the covenant-breaking state; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure.

4. It is the duty of each Member of the League to decide for himself whether a breach of the Covenant has been committed. The fulfilment of their duties under Article 16 is required from Members of the League by the express terms of the Covenant, and they cannot neglect them without breach of their treaty obligations.

5. All cases of breach of Covenant under Article 16 shall be referred to the Council as a matter of urgency at the request of any Member of the League. Further, if a breach of Covenant be committed, or if there arise a danger of such breach being committed, the Secretary-General shall at once give notice thereof to all the Members of the Council. Upon receipt of such a request by a Member of the League or of such a notice by the Secretary-General, the Council will meet as soon as possible. The Council shall summon representatives of the parties to the conflict and of all states which are neighbours of the defaulting state, or which normally maintain close economic relations with it, or whose co-operation would be especially valuable for the application of Article 16.

6. If the Council is of opinion that a state has been guilty of a breach of Covenant, the minutes of the meeting at which that opinion is arrived at shall be immediately sent to all Members of the League, accompanied by a statement of reasons and by an invitation to take action accordingly. The fullest publicity shall be given to this decision.

7. For the purpose of assisting it to enforce Article 16, the Council may, if it thinks fit, be assisted by a *technical* committee. This committee, which will remain in permanent session as soon as the action decided on is taken, may include, if desirable, representatives of the states specially affected.

8. The Council shall recommend the date on which the enforcement of economic pressure under Article 16 is to be begun, and shall give notice of that date to all the Members of the League.

9. All states must be treated alike as regards the application of the measures of economic pressure, with the following reservations:

(*a*) It may be necessary to recommend the execution of special measures by certain states:

(*b*) If it is thought desirable to postpone, wholly or partially, in the case of certain states, the effective application of the economic sanctions laid down in Article 16, such postponement shall not be permitted except in so far as it is desirable for the success of the common plan of action, or reduces to a minimum the losses and embarrassments which may be entailed in the case of certain Members of the League by the application of the sanctions.

10. It is not possible to decide beforehand, and in detail, the various measures of an economic, commercial, and financial nature to be taken in each case where economic pressure is to be applied.

When the case arises, the Council shall recommend to the Members of the League a plan for joint action.

11. The interruption of diplomatic relations may, in the first place, be limited to the withdrawal of the heads of missions.

12. Consular relations may possibly be maintained.

13. For the purposes of the severance of relations between persons belonging to the covenant-breaking state and persons belonging to other states Members of the League, the test shall be residence and not nationality.

14. In cases of prolonged application of economic pressure, measures of increasing stringency may be taken. The cutting-off of the food supplies of the civil population of the defaulting state shall be regarded as an extremely drastic measure which shall only be applied if the other measures available are clearly inadequate.

15. Correspondence and all other methods of communication shall be subjected to special regulations.

16. Humanitarian relations shall be continued.

17. Efforts should be made to arrive at arrangements which would ensure the co-operation of states non-members of the League in the measures to be taken.

18. In special circumstances and in support of economic measures to be taken, it may become advisable: (*a*) to establish an effective blockade of the seaboard of the covenant-breaking state; (*b*) to entrust to some Members of the League the execution of the blockade operations.

19. The Council shall urge upon all the states Members of the League that their Governments should take the necessary preparatory measures, above all of a legislative character, to enable them to enforce at short notice the necessary measures of economic pressure.

COLLECTIVE SECURITY [1]

By ARNOLD D. McNAIR, C.B.E., LL.D., Whewell Professor of International Law in the University of Cambridge; Fellow of Gonville and Caius College.

It would be a mistake to use this occasion for an attempt to say something which would be of interest only to my fellow international lawyers, and I prefer to try to answer some of the questions which are now stirring in the minds of many laymen upon the meaning of the term "Collective Security" and upon the true place of force in a system of international law. Two reasons impel me to do this. The first is that the Whewell Professor is particularly charged by the founder of his chair "to make it his aim in all parts of the subject to lay down such rules and to suggest such measures as may tend to diminish war and finally to extinguish war between nations". The second is that at present, unfortunately, we have in this University no chair of International Relations, so that the Whewell Professor may be forgiven if occasionally he strays a little across the frontier which divides law from politics, even when this can only be done at the cost of approaching the debatable zone of current controversy.

The Former Attitude Towards War

Let us put ourselves in the position of a student of international law in the first decade of this century who wanted to know what was the attitude of that system of law towards war. He would be told that three centuries ago Grotius, following some of his predecessors, had attempted to classify the causes of war (with particular reference to their bearing upon the attitude of third parties), and that, as Professor Brierly[2] has written, "at the heart of his system lay the attempt to distinguish between lawful and unlawful war", but that "this distinction never became part of actual international law" and "finally it disappeared even from theory". Our student would then turn to Hall's *International Law*, which was generally regarded as the most characteristically British exposition of the subject. There he would read that[3]

[1] An Inaugural Lecture delivered on January 23, 1936. (The Committee wish to acknowledge their indebtedness to the Cambridge University Press for permission to reprint this lecture. J.F.W.)

[2] *The Law of Nations*, 1st ed., pp. 25, 26.

[3] 5th ed. (1904), by J. B. Atlay, p. 60.

"As international law is destitute of any judicial or administrative machinery, it leaves States, which think themselves aggrieved, and which have exhausted all peaceable methods of satisfaction, to exact redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions."

Hall then points out that theoretically international law, professing to be a comprehensive system, "ought to determine the causes for which war can be justly undertaken", but has tried and found it impossible to do so. He adds that

"it might also not unreasonably go on to discourage the commission of wrongs by investing a State seeking redress with special rights and by subjecting a wrong-doer to special disabilities",

but in his opinion

"it would be idle for it to affect to impart the character of a penalty to war, when it is powerless to enforce its decisions. . . . International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."[1]

The Edwardian student would then turn to Westlake, of whom I like to remember that several of my colleagues were his colleagues, and there he would read that[2]

"International law did not institute war, which it found already existing, but regulates it with a view to its greater humanity. War is a piece of savage nature partially reclaimed, and fitted out for the purpose of such reclamation with legal effects, such as the abrogation or suspension of treaties, and legal restrictions, such as what are called the laws of war and neutrality."

Westlake then adds[3] that

"an attempt is sometimes made to determine in the name of international law the conditions on which a recourse may be had to arms . . . but these are not rules of law . . . and the legal character of a war is the same whether they have been observed or not."

To the same effect writes Oppenheim, our much loved colleague by adoption:[4]

"War is not inconsistent with, but a condition regulated by, international law. The latter at present cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their difference."

Such were the opinions upon the relation of international law

[1] *Op. cit.*, p. 61.
[2] *International Law*, Vol. II, "War", 1st ed. 1907, 2nd ed. 1913, p. 3.
[3] *Ibid.* p. 4.
[4] *International Law*, Vol. II, "War and Neutrality", 1st ed. 1906, 2nd ed. 1912, § 53.

to war which I learned as a student. To regard as reactionaries the teachers whom I have quoted, would be absurd: they correctly described the contemporaneous attitude of international law towards war. Great efforts were made before and during that period, notably by the Conventions emanating from the two Hague Peace Conferences of 1899 and 1907, to introduce some order into the conduct of war, and those Conventions and the customary law underlying them had more success and effect than has been realized by laymen accustomed to see and hear more of their violation than of their normal operation. My immediate predecessor, Professor Pearce Higgins, made himself an acknowledged master of this branch of the law. His main inspiration, as I see it, was the desire to impress the public, and the generations of students here and naval officers at Greenwich who came under his influence, with a sense of the binding obligation of the rules which experience and humanity had evolved for placing some checks upon the licence and barbarity of war.

But there international law stopped. War itself was no illegality. Its outbreak might sometimes involve the breach of a treaty or some other international wrong, but it more frequently took rise in circumstances not falling within the sphere regulated by law. It was extra-legal rather than illegal. Whether or not the initiation of a war was a breach of law, the rules which regulated it, once it had broken out, were the same for both or all parties. And, what is more germane to my argument, the rules which governed the attitude of states not participating in a war towards the belligerents—the law of neutrality—were the same, regardless of the rights and wrongs of the war. A rigid impartiality in their conduct towards the belligerents was required by the law.

The Present Attitude

All this changed some years ago—at any rate for the greater part of the world. Most international lawyers have realized that change for some time and have been expounding it, but the majority of laymen had not grasped the change until quite recently, and many of them are reluctant to admit the change even now. Let me mention three facts before I attempt to trace the development which has culminated in this change. Firstly, on October 9, 1935, war having broken out between two states, Italy and Abyssinia, fifty governments, including our own, met in conference and put it on record that in their opinion Italy had

"resorted to war in disregard of its covenants under Article 12 of the Covenant of the League".

The second fact is that to-day fifty governments are engaged in a series of measures, directed to handicap one of two belligerents in its contest with its adversary and eventually to make it impossible for it to continue the contest. Examine those measures, which are four in number: (1) an embargo on the export, re-export, or transit to Italy and her possessions of arms, munitions, and implements of war, while leaving their supply to Abyssinia unrestricted; (2) the prohibition of the grant of loans and credits to the Italian Government and all persons and corporations in Italian territory, while leaving the supply of similar facilities to Abyssinia unrestricted; (3) the prohibition of imports (other than gold and silver bullion and coin) from Italy into the co-operating countries, while leaving imports from Abyssinia unrestricted; (4) the prohibition of the export or re-export or transit to Italy and her possessions of a long list of "key materials", particularly minerals and transport animals, while leaving supplies to Abyssinia unrestricted.

The third fact is that our government, which has always been foremost in pursuing a policy of strict impartiality in wars to which it is not a party, has recently passed a series of Orders in Council making it a penal offence for persons in the United Kingdom to carry on with one belligerent certain trades which in previous wars they have always been free to maintain with either or both belligerents so far as the law of this country is concerned.

Public opinion has been led up to these events so gradually and so patiently that their momentous character is obscured. I am not here concerned with British policy in regard to this dispute or with the questions whether sanctions might have been applied with greater determination and whether they ought to be increased. What I wish to emphasize is the legal character and the historical significance of what is now being done. The first feature is that it is an unheard of thing that fifty non-belligerents should meet and expressly concur in singling out one of two belligerents for condemnation as a treaty-breaker and an aggressor. The second is that most, if not all, of the measures now in force in the name of sanctions would twenty-five years ago have been serious breaches of the law of neutrality, affording to the victim of them good ground for reprisals or more serious action. There is no question but that these measures would have come as a

surprise to Hall and Westlake[1] and above all to that exponent of the law of neutrality, Sir William Harcourt, the first Whewell Professor, had they not known of certain changes in the law which have intervened; for it is impossible to reconcile these measures with the duty of impartiality traditionally incumbent upon neutral states.

What, then, are these changes in the law and to what cause are they due? Let us deal with the second question first. The Great War of 1914 to 1918, by reason of the area affected by it, the destructive character of the instruments employed in it, and the intensity of suffering on the part of combatants and non-combatants alike, produced a revulsion of feeling against war greater than that which usually follows the close of a war. Many were driven to hold the view, held by an increasing number to-day, that in no circumstances can the use of armed force as between states be justified and in no circumstances should it be resisted. Some base this view upon Christian or other principles of morality, and there are others who base it upon historical and personal experience, believing that no evil can be so great as the evils, spiritual and material, which flow from taking up arms or from resisting them, and that expressions such as "national self-defence" are merely phrases used by governments to delude their peoples. I have neither the skill nor the time to examine this view from any of these aspects, nor is it essential to my theme that I should do so; for this is not the view of force which was adopted by the Peace Conference of 1919.

The Policy of Collective Security

The treaties emanating from that Conference embody a new principle, commonly called the principle or policy of Collective Security, to which at present fifty-eight governments (including our own) stand pledged. Instead of the traditional legal indifference to the question of the responsibility for the outbreak of war there is substituted machinery for determining the party responsible and for condemning as illegal a resort to war without previously exhausting the machinery of the Covenant of the League for the settlement of disputes. In addition to the traditional right and duty of individual self-defence there is created a collective obligation to apply economic pressure in order to restrain an illegal resort to war, with an option to contribute armed force

[1] Westlake was fully alive to the moral necessity of the disappearance of the orthodox attitude of strict indifference: see his *Collected Papers*, pp. 375 *et seq.*

if necessary. On the one hand, war in breach of the Covenant is made illegal; on the other, force which is collectivized and placed at the service of the international community is made legal.

This new policy of collective security has suffered, I think, in popular esteem by being treated too much as a great ethical ideal and too little as a sound business proposition. It seems to me to rest on three main reasons. In the first place, experience of the old system has shown that the claim of one state to be so strong as to feel secure against a rival state involves, as has been repeatedly pointed out, a denial of a similar claim to the latter, with the result that it sets to work to tip the balance in its favour either by increasing its armaments or by concerting precarious alliances and *ententes* which in turn provoke counter-alliances and counter-*ententes*. Secondly, it is felt that if a state can count upon a substantial and reasonably adjacent portion of the international community coming to its aid, and, if necessary, pooling forces to protect it from aggression, it and likewise other states will be content with a lower level of armaments than if it has to rely only upon itself and any allies it can pick up and feel sure of. The third reason is that force is less likely to be abused if for the purely national and subjective test of the justification of a war there is substituted a collective judgment by parties other than the states involved and a collective condemnation of any war found by that external test to be illegal. This view was only imperfectly carried out by the Covenant, but, as we shall see, the Kellogg-Briand Pact to some extent remedies this deficiency. In a sentence, if so much can be compressed in a single sentence, the principle underlying the Covenant, in relation to the preservation of peace, is the creation of machinery for the settlement of disputes and for stigmatizing certain wars as illegal and the concerting of collective action against a state initiating an illegal war.

The machinery for the settlement of disputes takes two forms, firstly, reference to the Permanent Court of International Justice or a tribunal of arbitration, and, secondly, reference to the Council of the League for an attempt at conciliation and, failing that, for a Report which when adopted unanimously (excluding the disputing parties) has certain definite legal consequences, as has been illustrated by the dispute between Italy and Abyssinia. The first of these methods is voluntary except in so far as the parties have already bound themselves in advance, as for instance

by what is called the "Optional Clause" of the Statute of the Permanent Court, to refer disputes of certain categories to judicial or arbitral settlement. The second is, for members of the League, obligatory in default of arbitration or judicial settlement; it is also residuary in character in that it sweeps up and governs disputes not settled by the first kind of machinery. The Permanent Court has, since it opened its doors in 1922, rendered more than sixty Judgments and Advisory Opinions, and in no instance has any party to the litigation defied the authority of the Court by refusing to give effect to its decision. I cannot digress into a discussion of the judicial and arbitral settlement of disputes beyond saying that the output of international law from judicial and arbitral sources since the World War has been prodigious. Coupled with the increase in multipartite treaties laying down rules of law, this output is rapidly transforming international law from a body of general principles resting mainly on text-book authority into a system of rules for which authority can be quoted from judicial and conventional sources, much in the same way as a modern system of national law rests on judgments and legislation. Forty-nine years ago Sir Henry Maine in a course of twelve Whewell Lectures[1] found it necessary to cite only two national judgments, one English and the other American, and one international award, the *Alabama*. A glance at a modern text-book of international law shows what an enormous advance in the law-making process has been made in half a century.[2]

The Kellogg-Briand Pact

But the League machinery is limited in its scope. Only fifty-eight states and Dominions are bound by it and among the absentees are Germany, Japan, and the United States of America. Outside the League there is frequent resort to judicial and arbitral machinery for the settlement of disputes, but there is no effective provision for collective action against an act of aggression upon a state not a member of the League; though in theory, but at present only in theory, the League machinery of collective action could be applied as between non-members. Not only is membership of the League limited but the Covenant leaves outside its ban certain kinds of war, particularly war undertaken when the Council or the Assembly has announced its failure to

[1] *International Law*, published by John Murray in 1894.

[2] The volumes of the *Annual Digest of Public International Law Cases* give a more eloquent testimony.

reach a unanimous Report (excluding the disputing parties) and when three months have elapsed after that failure. Accordingly, in 1928 another change took place in the attitude of international society and international law towards war and is embodied in the Kellogg-Briand Pact, or Peace Pact of Paris as it is sometimes called. The articles of this simple document are two in number and are as follows:

Article 1

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2

"The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The distinctive characteristics of this Pact and its principal differences from the Covenant may be summarized as follows:

(*a*) the Pact has been accepted by sixty-two states and Dominions and is for all practical purposes universal in its territorial scope;

(*b*) the probable[1] effect of Article 2 is to make any resort to armed force for the settlement of an international dispute illegal and thus avoids the technical point, prominent under the Covenant in the Sino-Japanese dispute of 1931 to 1933, that not every resort to armed force amounts to "resort to war";

(*c*) it is a reasonable view, though I cannot assert it to be an established opinion, that a breach of the Pact is a legal wrong not merely against the victim of the resort to armed force but also against the other signatories of the Pact;

(*d*) it contains *within it* no provision for collective sanctions, thus avoiding one of the main obstacles preventing the ratification of the Covenant by the United States of America; but a breach of it can be met by its signatories, alone or collectively, by the measures[2] available for the prevention or redress of the breach of any other treaty, if they choose to take this course;

[1] I say "probable" because there is some controversy on the question whether the words "except by pacific means" permit a resort to armed force which does not technically amount to war: see Lauterpacht on Oppenheim, *International Law*, Vol. II (5th ed.), § 52 *l*.

[2] What these measures may be is a highly controversial matter: see Lauterpacht in *Transactions of Grotius Society*, Vol. XX (1935), pp. 178–202. It is worth noting that Mr. Eden (as Minister for League of Nations Affairs) speaking in the House of Commons

(*e*) most breaches of the Pact of 1928 will also be breaches of the Covenant, so that while the United States of America does not co-operate in the collective action under the Covenant the fact of their being a party to the Pact of 1928 tends to produce, between that country and the League, a coincidence in the condemnation of an aggressor, as happened in the recent Sino-Japanese dispute, and will, I hope, eventually happen in the case of the Italo-Abyssinian war.

Such, then, in the briefest outline, are the two main documents which express in legal form the changing attitude of international society towards force. They may be summed up in two propositions: resort to armed force for the settlement of an international dispute is an illegal act, and, I submit, that illegal act is the commission of an international wrong (breach of treaty) against every state in the world (with unimportant exceptions such as Thibet) and not merely upon the victim of the use of force. That is the big new factor added by the Kellogg-Briand Pact. It is that which might, and, I think, would, justify a signatory of the Pact in conducting itself towards an aggressor in a manner which before the Pact would have amounted to unneutral conduct.

Collective Revision of the "Status Quo"

I have touched on only one aspect of the collective system—the collectivization of force. Equally important is the collective and peaceful revision of treaties and other international conditions whose continuance is a reasonable cause of friction. This principle is embodied in Article 19 of the Covenant and in Article 2 of the Pact of Rome made on June 7, 1933, between France, Germany, Italy, and the United Kingdom, but in both cases only as a principle. There is urgent need of machinery to translate that principle into practice. It is also hinted at in Sir Samuel Hoare's speech to the League Assembly on September 11, 1935, when he referred to "fear of monopoly—of the withholding of essential colonial raw materials" and "the desire for a guarantee that the distribution of raw materials will not be unfairly impeded. . .". This is only a beginning. There are certain key commodities and key positions whose continuance in the sole control of a single Power or group of Powers produces a sense of unfair-

of a breach, not of the Kellogg-Briand Pact, but of the Covenant, said: "We do not consider that any Covenant-breaking State has any legal right to require the observance by other members of the League of any of the laws of neutrality." *Hansard* (Commons), Vol. 305, p. 218 (October 23, 1935).

ness and insecurity which will not be removed until that control (which is not the same as ownership) is vested in the hands of some international authority. I do not see how you can justify a situation in which one or a few Powers can hold others to ransom, if they choose to do so, because they happen to be in control of an international highway or a vital commodity.[1] If the control of such a highway were international, the exercise of that control in aid of collective security would be easier to justify and to effect than it is while the control resides in national hands. There has been a good deal of talk recently of transferring colonies to Powers who have few or none and of the possession of a colonial empire as essential to the *amour propre* of a powerful nation. My own view is that to do anything which would tend to stereotype the colonial system in any of its present stages would be unfortunate. I regard them as transitional. I should prefer to see the colonial Powers encouraging (as we are doing) certain of their colonies to become self-governing communities. As for those colonies and protectorates not likely to be suited in the comparatively near future for this development, I consider that more would be gained than lost if many of them, though not all, were administered under some kind of international guardianship like the mandate system for the benefit of their inhabitants and the world at large. I may mention as features of that system the prohibition of native military forces for other than police purposes and local defence, and the provision of the economic open door. All this lies outside the scope of this lecture. I merely remind my audience that a system which collectivizes the use of force and provides no machinery for the collective revision of the *status quo* is certain to fail, as has been cogently shown by Sir John Fischer Williams in his short book entitled *International Change and International Peace.* The direct and positive use of collective force for the revision of the *status quo* is in my opinion unthinkable. But it is worth considering whether as a first step consent to a revision may not be induced, indirectly and negatively, by making it clear that a state which obstinately declines to co-operate in a revision pronounced after due investigation to be essential to the general welfare cannot rely upon the use of collective force in support of an untenable claim.

[1] For a summary of the distribution of minerals and mineral products, including petroleum, and the manner in which the denial of them to an aggressor can be used as a collective sanction, see Sir Thomas H. Holland's most valuable book, *The Mineral Sanction* (1935).

The Role of the Individual

I have mentioned only two great international instruments, the Covenant of the League and the Kellogg-Briand Pact, and I mention them because they are in force between fifty-eight and sixty-two states and Dominions respectively. But I could point to many other treaties drafted during the past seventeen years, some not in force, others only sparsely ratified, but all of them indications of the new movement on foot for the organization of collective action for the preservation of peace; for instance, the Draft Treaty of Mutual Assistance of 1923, the "Geneva Protocol" of 1924, the "General Act of Arbitration" of 1928, the Convention on Financial Assistance of 1930, the Convention to Improve the Means of Preventing War of 1931, the Rio de Janeiro Pact of Non-Aggression and Conciliation of 1933, &c. In view of this persistent effort is it possible for any fair-minded man to dismiss this movement by saying that a zealous band of visionaries in 1919 stampeded the Allied Powers into the adoption of a crazy scheme? Is it not a more reasonable interpretation to regard these developments as evidence, in General Smuts's memorable phrase, that "mankind is on the march" and seeking for some new form of organization in which we can retain and develop our personal and national life and characteristics, without the constant fear and frequent happening of the collisions between national groups which throw back civilization and now threaten to overwhelm it? At any rate I submit to you the view that this is the correct interpretation of the years since the Armistice of November 1918. I also suggest that it is primarily to the individual citizen that we must look to supply the driving-force behind this movement and not to his government. It has been accepted as the business of governments to promote the interests of the nations whose professional champions they are. It is inevitable that governments should be reluctant to abate one iota of their clients' interests, and it is only when they can be absolutely convinced that in the long run the interests of the international community coincide with those entrusted to them that most of them will move a single step in an international direction. Some of them are very hard to convince. The application of collective security involves risks; but the success of flagrant aggression in breach of solemn treaties is a danger to avert which some risk is justified, and the risk will diminish as the precedents for successful collective action accumulate.

Most great movements in public affairs originate with individuals, not with governments. It was a popular movement in this country which, after securing the abolition of the slave-trade throughout the British Empire, compelled our representatives at Vienna in 1815 to insist upon annexing to the Congress Treaty a condemnation of the trade and later made the British Government the protagonist in the international suppression of that evil. It was the devotion of a single Swiss citizen, Dunant, which infected a group of his fellow-countrymen with his zeal and ultimately induced his government to convoke a conference and secure the adoption of the Geneva Red Cross Convention of 1864. The League of Nations originated in the parallel work of two groups of citizens, one in our country and the other in the United States of America. It is, I submit, only by the action of individuals in maintaining a constant pressure upon their governments that this new movement can be brought to fruition.

The League and Armed Force

What is happening now is not that force is being abolished. It is being collectivized, denationalized. The manner of its exercise remains national: the judgment which precedes and authorizes its exercise is collective.[1] When thus authorized, it acquires the character of a public sanction, while its actual exercise remains in private hands. Such, as I see it, is the essence of the system of collective security towards which the world, or at any rate Europe in the first place, is groping its way and which is at the moment on trial. Hitherto there has been a tendency to assume that it is the League whose duty it is to afford security, but we are now beginning to realize that it is upon the League's members that this duty rests. If we think that the principle of collective security can be established without incurring risk, we delude ourselves. To say, as some are now saying, that the

[1] There is at present a movement for the creation of an *international* force, that is, a force recruited by and responsible to a truly international organ. I do not propose to state here why I think that this proposal is not at present within the field of practical politics. I will merely point out that such a force is something quite different from *collective* force contributed by states in support of the policy of collective security. Among other differences there is the fact that in the case of collective force the responsibility for its use rests with governments, whereas the decision to use an international force would presumably rest with the individuals in control of the international organ. There are many who will prefer that a decision to employ armed force should only be taken by governments; for they are likely to realize that in so doing they are staking the future of their countries, and will probably act with a greater sense of responsibility than a group of individuals, though, it must be admitted, often with less promptitude.

Covenant does not contemplate the possible necessity of the use of armed force as part of that collective action is completely erroneous. It is only necessary to read Articles 10 and 16 of the Covenant and the British official "Commentary" on the Covenant published in 1919, while the memorandum addressed to the League Committee on Arbitration and Security in 1928 by the United Kingdom Government[1] and many other official declarations are to the same effect. Moreover, we have constantly been told that it is necessary to maintain our armaments at a level adequate to enable us to carry out our obligations under the Covenant, and as recently as December 21, 1935, the Chancellor of the Exchequer is reported in *The Times* to have said that it would be "the duty of the Government in these coming years to restore our defence forces to a level at which we can feel that not only have we secured the safety of this country and those great trade routes between us and the other members of the British Empire upon which our existence depends, *but we are also in a position to back up our collective action at the League. . .*".[2] No member of the League is compelled to contribute armed force in defence of the Covenant, but in certain events the Covenant authorizes it to do so if in its discretion it should think fit. Moreover, a member of the League before co-operating in any sanction that is likely to provoke an attack by the aggressor affected by it must realize that in such an event it will be necessary to use force. It has therefore a right to receive in advance from a reasonably powerful section of its co-operators specific and satisfactory assurances of the mutual support stipulated for by paragraph three of Article 16.

United States of America

As for the United States of America, I will only say this. No reasonable person, in the present position of international affairs, can count upon that country contributing armed force for the repression of an aggressor in pursuance of a system of collective security. But is it too much to expect that, when there is a clear breach of the Kellogg-Briand Pact and in consequence a breach of a treaty with that country, the American Government, which with France was primarily responsible for the Pact, should reply to the breach of treaty by departing from the traditional law of neutrality and preventing its citizens from frustrating the efforts of its fellow signatories of that Pact by trading with a proclaimed

[1] *League of Nations Official Journal*, May 1928, p. 694.

[2] Italics mine.

aggressor? In the present Italo-Abyssinian dispute the President has[1] "warned American citizens against transactions of any character with either of the belligerent nations except at their own risk". This warning does not in terms discriminate between the aggressor and the victim of the aggression. But if it means that the American Government would refrain from protecting American trade with the aggressor from interception by a group of states applying sanctions, then indirectly the new American policy would work in favour of collective security.

Conclusion

When I consider our own place in this movement, I sometimes think of Watts's picture entitled "For he had Great Possessions". We too have done pretty well out of the old system. Are we going to turn our back like the man in that picture on this new movement or are we going to shoulder our share of the responsibility and play our part with all the risks which the new policy entails? It is difficult for us at home to realize how much other countries look to us to give the lead in this matter which our position entitles them to expect. I do not think I am guilty of national presumption when I say that our attitude towards the movement is one of outstanding and perhaps decisive importance. In the past two years the two periods during which our national prestige in the world has been at its highest have been those during which we have been taking a lead in the use of collective action in the interests of peace. The first period was when we proposed at Geneva that a collective force should be admitted to the Saar Territory and be responsible to the Governing Commission of that Territory for the maintenance of order during the dangerous time of the plebiscite and before the handing back of the Territory to Germany. That force was contributed by Italy, Holland, Sweden, and ourselves. The second was the period represented by Sir Samuel Hoare's great speech in the League Assembly on September 11, 1935, reaffirming his country's support of the League's obligations "for the collective maintenance of the Covenant in its entirety and particularly for steady, collective resistance to all acts of unprovoked aggression", and by our subsequent leadership in the policy of sanctions. During both these periods our international standing has been pre-eminent. During both our government has commanded a more united national support than democratic governments usually enjoy. But, as Sir

[1] *Bulletin of International News*, November 9, 1935, p. 60.

Samuel Hoare said, "if the burden is to be borne it must be borne collectively". We cannot do more than our fair share. If through other nations failing to do their share the movement towards collective security receives a check, it must be no more than a check. We must make it clear that only those who are prepared to share the burden can expect to enjoy the benefit. *Qui sentit commodum sentire debet et onus.* Collective security will not be established in one year or in ten years. It will result from an accumulation of effective pieces of collective action. But if we are patient and hold firm to our declared policy (which comprises collective revision of the *status quo* as well as collective resistance to aggression), and if we insist that those are the terms on which we are prepared to co-operate in the preservation of peace, my belief is that eventually the principle of collective security will be established, that, though at first limited in territorial scope, it will spread, and that it will introduce a new and saner epoch in international relations, an achievement in which we shall be glad to have taken a leading part.

SIR WILLIAM HARRISON MOORE

By the sudden and untimely death of Sir William Harrison Moore on July 1, 1935, at the age of 68, legal, constitutional, and international studies lost a distinguished exponent, and the British Commonwealth of Nations an acknowledged leader.

Moore received his legal education at King's College, Cambridge, the University of London, and the Middle Temple, and was reading in the late Sir Thomas Scrutton's chambers when he was appointed to succeed Professor Edward Jenks in the chair of Law at the University of Melbourne. Dean of the Faculty of Law in Melbourne he remained from 1893 until his retirement in 1927. Thereafter he represented the Australian Government at the Assembly of the League of Nations in 1927, 1928, and 1929, and also at the International Copyright Conference of 1928, and the Operation of Dominion Legislation Conference in 1929. This bare recital of the more public of Moore's activities since his retirement would alone reveal him as much more than a law teacher and writer; he was one of the small group who truly merit the appellation of publicist. He was as interested in people as he was in ideas, his judgment was far-reaching and sound, and, as might be expected, he was very widely consulted. In this way he exercised a great influence, over and above that perhaps even less measurable influence which a distinguished University teacher exercises through his pupils and his writings. His work did much to shape the early course of development of the Commonwealth constitution—an achievement not lessened by the fact that subsequent development has proceeded on other lines. The proceedings of the Operation of Dominion Legislation Conference have not been made public, but those who knew Moore's great ability as a negotiator, his profound grasp of principle, and his devotion to the ideals of the British Commonwealth of Nations cannot doubt that his influence there must have been considerable. It is scarcely necessary to say that he helped very materially to form the characteristic Australian view of inter-Imperial relations.

Moore's great contribution to the thought of his generation lay in constitutional rather than in international law. His first large book on the constitution of the new Commonwealth of Australia (1900) displayed to the full his remarkable combination of care and patience with speculative insight and power. A smaller book followed in 1906, on Act of State in English Law.

Thereafter, until the time of his death, he was an active and learned contributor to legal periodicals. So original and independent a mind addressed itself naturally to the unsolved problems at the frontiers of his subject. His last considerable piece of work was characteristic of him: a paper, published after his death in the *Journal of Comparative Legislation*, on the law to be applied in suits between governments in Canada and Australia. That piece of work, like much else in his constitutional studies, led him out into the borderland in which the relations between constitutional law and international law are close. The same is true also of a useful paper, on separate action by the British Dominions in foreign affairs, which he read in 1933 at the inception of the new Australian and New Zealand Society of International Law. Pressure of other University duties pushed into the background his work as a teacher of international law, but his constitutional studies preserved his living interest in the subject. He was ever an active worker for international peace and a profound believer in the rule of law, in international as in municipal affairs.

His independence of character found expression in a number of innovations in the curriculum at his University. It is of interest to note that the Melbourne Law School seems to have pioneered in the Empire the teaching of administrative law as a separate subject. At the International Copyright Conference and in his work at the League of Nations, Moore had been keenly interested in his contact with lawyers trained in the tradition of the civil law; it is almost a pity that he had already retired from his chair, for his experience would doubtless have enriched the Australian Universities with comparative studies of a quite original kind.

K. H. Bailey

NOTES

THE LOCARNO PACT AND THE FRANCO-SOVIET PACT

THE German view of the legal and political effects of the conclusion of the Franco-Soviet Pact upon the Locarno Treaty of Mutual Guarantee may be gathered from the Blue Book, Miscellaneous No. 3 (1936)[1] published by the United Kingdom Government in April 1936, and particularly from two memoranda by the German Government contained in it and dated May 25, 1935, and March 7, 1936. The best summary is perhaps the following which is taken from the second of these memoranda:

"1. It is an undisputed fact that the Franco-Soviet Pact is exclusively directed against Germany.

"2. It is an undisputed fact that in the pact France undertakes, in the event of a conflict between Germany and the Soviet Union, obligations which go far beyond her duty as laid down in the Covenant of the League of Nations, and which compel her to take military action against Germany, even when she cannot appeal either to a recommendation or to an actual decision of the Council of the League.

"3. It is an undisputed fact that France, in such a case, claims for herself the right to decide on her own judgment who is the aggressor.

"4. It is thereby established that France has undertaken towards the Soviet Union obligations which practically amount to undertaking in a given case to act as if neither the Covenant of the League of Nations, nor the Rhine Pact, which refers to the Covenant, were valid.

"This result of the Franco-Soviet Pact is not removed by the fact that France, in the pact, makes the reservation that she does not wish to be bound to take military action against Germany if by such action she would expose herself to a sanction on the part of the guarantor Powers, Italy and Great Britain. As regard this reservation, the decisive fact remains that the Rhine Pact is not based only on the obligations of Great Britain and Italy as guarantor Powers, but primarily on the obligations established in the relations between France and Germany. Therefore it matters only whether France, in undertaking these treaty obligations, has kept herself within the limits imposed on her so far as Germany is concerned by the Rhine Pact.

"This, however, the German Government must deny."

It is difficult to do justice to the argument by this short extract, and the reader is referred to the two memoranda mentioned above. The crux of the legal argument, however, stated somewhat popularly, appears to be this. When by the "Locarno Pact" France and Germany agreed "that they will in no case attack or invade each other or resort to war against each other", certain qualifications were attached to this obligation. One of them was "action in pursuance of Article 16 of the Covenant"; another was "action as the result of a decision taken by the Assembly or by the Council of the League of Nations, or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a state which was the first to attack".

[1] *Cmd.* 5143.

At first sight Article 3 of the Franco-Soviet Pact[1] coincides with the first of these qualifications and Article 2 with the second. Moreover, Article 3 of the Franco-Soviet Pact contains the following further material undertaking:

> "The same obligation [i.e. to give each other immediately aid and assistance in execution of Article 16 of the Covenant] is assumed in the event of France or the U.S.S.R. being the object of an attack on the part of a European state in the circumstances specified in Article 17, paragraphs 1 and 3, of the Covenant of the League."

Article 17 of the Covenant, it will be remembered, enables (*inter alia*) the League machinery to be applied in the case of a dispute between a Member of the League and a non-Member. The addition quoted above, therefore, seems to be a reasonable addition in view of the fact that Germany had left the League, though incidentally it lends a certain colour to the German argument that the Franco-Soviet Pact is directed against her; for all the other neighbours of France and all the European neighbours of the U.S.S.R. are at present Members of the League, and the Franco-Soviet Pact (Article 1) is expressly confined to an attack by a European state and thus excludes a Japanese attack.

However that may be, the German Government does not appear to object to the mere incorporation within the sphere of the Franco-Soviet Pact of the machinery of Article 17 of the Covenant. What it does very strongly object to is this. There is a Protocol annexed to that Pact, Article 1 of which is as follows:

> "1. It is agreed that the effect of Article 3 is to compel each contracting party immediately to give assistance to the other by complying forthwith with the recommendations of the Council of the League of Nations as soon as they shall have been made in accordance with Article 16 of the Covenant. It is further agreed that the two contracting parties will take joint action to ensure that the Council issue their recommendations with all the speed required by the circumstances of the case, and that, should the Council nevertheless, for some reason, make no recommendation or fail to reach a unanimous decision, effect shall nevertheless be given to the obligation to render assistance. It is also agreed that the provisions for mutual assistance embodied in this treaty refer only to the case of an attack on either of the contracting parties' own territory."

The German argument on this point, as stated in the memorandum of May 25, 1935, runs as follows:

> "It follows from this text that the two contracting parties, before undertaking any action which they intend to base upon Article 16 of the Covenant, will address themselves first of all to the Council of the League of Nations, but that they are, none the less, decided to fulfil the obligations of assistance agreed upon between themselves, if, for some reason or other, the Council of the League does not produce a recommendation or if it does not reach a unanimous decision. This provision can only be understood in the sense that France claims for herself, in the event of a conflict between Germany and the U.S.S.R., the right to take military action against Germany in virtue of Article 16 of the pact [Covenant], even if she cannot cite a recommendation or some other decision of the Council of the League of Nations. It seems that, after the departure of Germany from the League of Nations, this course of action is also intended in the case where the decision of the Council regarding the

[1] Printed in the Blue Book cited above.

invitation to be addressed to Germany in virtue of Article 17, paragraph 1, of the pact [Covenant] has not been reached. The German Government considers that military action undertaken in such conditions would be outside the limits of Article 16 of the pact [Covenant], and would, consequently, constitute a flagrant violation of the Treaty of Locarno. The wide scope of the Franco-Soviet understanding in this respect is manifest. It is true that the treaty lays down that assistance shall only be given in the event of an unprovoked aggression on the part of Germany. This event will never occur, for Germany has no intention of taking any aggressive action against the U.S.S.R., but, none the less, the problem is not solved, for the decisive point is that France, according to the section of the protocol of signature above mentioned, claims for herself the right in the event of a German-Soviet conflict to decide unilaterally and at her own discretion who is the aggressor, and, in virtue of her decision, to take military action against Germany."

In other words, Germany appears to claim that while by the Covenant of the League and the Locarno Pact military action taken by France or the U.S.S.R. to assist one another in pursuance of Article 16 of the Covenant must be preceded by a decision by the Council (either a recommendation under Article 16 (2) of the Covenant or some other decision), the Franco-Soviet Pact provides that the parties must do their best to procure such a decision from the Council, but that, if they cannot get it, they can and must go ahead without it. Further, the German Government appears to contend that the application of Article 17 to a dispute "upon such conditions as the Council may deem just" involves a decision of the Council to issue an invitation to Germany, and here again the Franco-Soviet Pact provides for action in default of such a decision. In other words, the German Government objects to what is sometimes described as the "automatic interpretation" of Article 16 of the Covenant and holds the view that a decision of the Council is a condition precedent to military action under that Article.

The main point in the French Reply[1] to the German argument is that "the application of Article 16, in accordance not only with its terms but also with the most authoritative interpretations thereof, does not necessarily require a recommendation of the Council". It is relevant to draw attention to the provisions of paragraph 3 of Article 4 of the Treaty of Mutual Guarantee relating to flagrant violations of that treaty, in which event the contracting parties agree to come to the help of the party attacked without any previous decision of the Council of the League though subject to compliance with any later decision of the Council.

The German argument thus raises but does not develop an important point of interpretation on Article 16 of the Covenant. Does a military reaction—i.e. war—by an individual Member of the League, other than the Member against whom the illegal resort to war is directed, require the previous assent of the Council? It seems usually to have been assumed that any Member was free to declare war as a result of the fact that under paragraph 1 of Article 16 an "act of war" had been committed against it. And for this interpretation the analogy of the clear duty of individual Powers to take economic measures may be invoked. Further, if the assent of the Council is required, what is to happen if owing to the lack of unanimity (excluding the parties)—a contingency not impossible in a Council of the present size—the Council can reach no decision? Or is all that is

[1] p. 44 of the Blue Book cited above.

wanted a "recommendation" by the Council, for which a majority vote may suffice? Article 16 (2) applies the word "recommend" to the action of the Council in co-ordinating military measures, and it is obvious that a hasty individual resort to war might upset the whole system of collective action which is the very basis of the Covenant.

These are matters on which it is difficult to speak with confidence after a mere examination of the text of the Covenant. A court dealing with the evolution of a new international system on the basis of a short and not very precisely worded document, such as the Covenant is, is in fact making a legislative contribution to the establishment of a new order of things—in this case, of a new international organization. In making that contribution a court will be governed by certain leading principles, possibly principles of centralization, possibly the reverse. But it is not possible for a lawyer to say beforehand that any particular interpretation of the text is "right" or "wrong". He has to await the emergence of the Chief Justice Marshall or the Lord Stowell who will give the directing impulse.

Another, and different, point in the German argument is as follows. At the time of the conclusion of the Locarno Pact it was known that France was on the same date signing treaties of guarantee with Poland and Czechoslovakia, and those treaties formed part of the whole "Locarno complex" and are expressly mentioned in the Final Protocol of the Locarno Conference. These treaties were in mind when the Locarno Treaty of Mutual Guarantee excluded from the general obligation by France and Germany not to attack or invade or resort to war against one another certain action in pursuance of the Covenant. A treaty of guarantee between France and the U.S.S.R. was not then envisaged and introduces a factor entirely alien to and subversive of the Locarno Pact.

Without underestimating Germany's political argument against the Franco-Soviet Pact, one may be permitted to regret very much that she was not willing to refer to the Permanent Court of International Justice or any other impartial tribunal—for example, the old Permanent Court of Arbitration—the legal aspect of her contention that the Franco-Soviet Pact violated and destroyed the Locarno Treaty of Mutual Guarantee. That contention may never be settled judicially, for the Council of the League has already passed judgment upon it. No Advisory Opinion was asked for, and it would take too long to explore here the question of what action the Court would probably have taken in the presence of such a request and of Germany's continued refusal to appear before the Court.

It may be added that in a discussion before a tribunal the further point might have been explored—how far, if the Franco-Soviet Treaty is in conflict with the provisions of the Locarno Pact, this fact authorized Germany without more to treat herself as liberated from that Pact. In other words, how far does the doctrine of "anticipatory breach" apply?

These are all nice points on the interpretation of documents. Does their discussion in public mean that great issues, involving perhaps the lives of millions of human beings, can be decided by legal argument and that the modern world accepts without qualification the precedence of the toga over arms? Or are these arguments in the nature of preliminary skirmishes—are they intended to strengthen on either side a belief in the justice of its own case rather than to prepare for a submission of the underlying issues to some peaceful method of solution?

We have not discussed the views of the Governments of the United Kingdom, Italy, and Belgium. They are contained in documents bearing dates in July 1935, and will be found in the Blue Book mentioned above. They accord with the French view.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Revision Protocol

The Protocol for the Revision of the Court's Statute has at last come into force. The Protocol was drawn up as long ago as 1929 and was soon signed and ratified by the great majority of the states parties to the original statute. The long delay in bringing it into operation was due to the absence of three ratifications: those of Brazil, Panama, and Peru. In September 1935 the Assembly of the League decided that the Protocol should enter into force on February 1, 1936, even if these ratifications had not been received, provided that the three states concerned raised no objection, and this condition having been fulfilled, the Secretary-General has notified the signatory Governments and the Registrar of the Court that the Protocol is in force.

The changes introduced into the Statute by the Revision Protocol may be summarized as follows:

1. Deputy Judges are abolished and the Court now consists only of the 15 Judges. The Judges must hold themselves permanently at the disposal of the Court, though provision is made for periodical long leave in the case of those whose homes are far distant from The Hague.

2. Instead of one ordinary session each year beginning on February 1, and supplemented by extraordinary sessions when necessary, the Court will now "remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court".

3. It is provided that the conditions under which a state which has accepted the Statute but is not a Member of the League may participate in the election of Judges shall, in the absence of a special agreement, be laid down by the Assembly.

4. In order to clear up a minor difficulty, the Protocol provides that a Judge may resign by a communication addressed to the President of the Court, the resignation taking effect on notification to the League, and provision is made for obviating delay in filling casual vacancies.

5. The occupations which Judges are precluded from following are extended to cover, besides political and administrative functions, "any other occupation of a professional nature".

6. The Chamber of Summary Procedure is increased from three to five members.

7. The system of national Judges is made applicable to cases before the Chamber of Summary Procedure, as well as to labour and transit cases.

8. Finally, a new Chapter dealing with advisory opinions is added to the Statute. This Chapter exactly reproduces the provisions upon this subject now in the Rules of Court, with the addition of the following Article: "In the exercise of its advisory functions, the Court will further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." This article corresponds with the existing practice of the Court.

A. P. F.

REFUGEES

THE impressive letter of resignation which Mr. James G. McDonald, High Commissioner for Refugees (Jewish and other) coming from Germany, addressed to the Secretary-General of the League of Nations on December 27, 1935, raises a point of legal, as well as political, importance.

"Apart from the Upper Silesia Convention of May 1922", the High Commissioner writes, "Germany does not appear to be expressly bound by a treaty obligation providing for equal citizenship of racial, religious, or linguistic minorities. But the principle of respect for the rights of minorities has been during the last three centuries hardening into an obligation of the public law of Europe. That principle was recognized in some of the most important international instruments of the nineteenth century...."

And again:

"It is not within my province to state to what extent the practice in this matter of the community of nations in the last hundred years and of the League of Nations has become a rule of customary international law; neither am I called upon to judge how far the declarations and the conduct of Germany prior to 1933 are in themselves sufficient to establish legal presumption."

In the face of these weighty and judicious sentences it would be rash to say more than that intervention, in the sense of the "interference of a state in the internal affairs of another state" (the language is Westlake's)[1] is not lightly to be undertaken, and its employment can hardly be determined on legal grounds alone.

O.

NEUTRALITY[2] AND ARTICLE 16 OF THE COVENANT

THE Editor of the 5th edition of volume 2 of Oppenheim's *International Law* in a passage which must have been written some time before August 1935 states,[3]

[1] *International Law*, Vol. I (Peace), p. 314 (1st ed.).

[2] It is unfortunate that the word "neutrality" is sometimes used in two senses, i.e. to describe (i) the ordinary status of a non-belligerent and (ii) the particular status of certain countries or territories, derived from special obligations not to go to war or to allow the territory to be used for the purposes of war in return for a guarantee by certain powers to protect or respect the independence and integrity of the territory. These territories are commonly described as "neutralized". Switzerland is a neutralized territory and was understood to have fully safeguarded her position as such when she entered the League by declarations which left her subject to all the obligations of an ordinary Member of the League as regards the economic action under paragraph 1 of Article 16, while safeguarding her from being called upon to lend her territory for the passage of the forces of the Members of the League or to take part in military sanctions. In the Italo-Abyssinian conflict, Switzerland did not contend that her neutralized status ("her neutrality") involved her abstention from all co-operation in economic sanctions against Italy, but nevertheless the fact that the same word is used for two different things rendered the statements made by Switzerland rather confusing and perhaps, in the matter of the prohibition on the export of arms, was partly responsible for their going a little farther than was really justified.

[3] § 292 (*a*), pp. 509 and 510.

"It is misleading to give currency to the view that the Covenant has abolished neutrality. Such an opinion is as inaccurate as the one according to which the Covenant has not affected neutrality at all. The correct view seems to be that while in some cases, in particular cases where resort to war is not contrary to the Covenant,[1] the latter has not altered the law of neutrality, it has, without abolishing it, vitally affected it in those cases in which Members of the League are bound to apply sanctions under Article 16."

Dr. Lauterpacht then goes on to say that a Member of the League is not bound to go to war with the Covenant-breaking state[2] and therefore in this sense can remain neutral, but it has the duty and the right to enforce sanctions.

"Such measures would normally constitute an abandonment of the attitude of impartiality incumbent upon neutrals and would be a violation of neutrality.[3] But—and here reveals itself the important innovation introduced by the Covenant in the law of neutrality—the Covenant-breaking belligerent must be deemed to have, by signing the Covenant, consented in advance to measures of discrimination being applied against him by those Members of the League who do not elect to declare war upon him."

The course of events in the Italo-Abyssinian conflict shows that the above statement of the position was an extremely accurate one as far as it went. It also renders it possible to add further details to this statement.

Under the text of Article 16 of the Covenant, a Member of the League has (*a*) a duty to take measures amounting to a complete severance of all trade and other relations with a Covenant-breaking state (paragraph 1), (*b*) a duty to assist other Members of the League in order to minimize the loss and inconvenience which they suffer from taking such measures, and (*c*) the duty to afford passage through its territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League (paragraph 3); it has also (*d*) the right, but not the obligation, itself to assist the attacked state by military measures (paragraph 2). Further, it can do all the things covered by paragraphs 1 and 3 and perhaps lend the armed assistance foreshadowed in paragraph 2 without considering itself to be at war with the Covenant-breaking state.

[1] Viz. wars between two non-Members of the League both of which refuse to accept membership *ad hoc* under Article 17 and any wars between Members which are not commenced in disregard of the obligations of Articles 12, 13, or 15 or where it has not been possible to state that one party is more guilty in starting the war than the other. Further, countries which are non-Members of the League (or perhaps more accurately countries which have never been Members of the League) would not by reason of the provisions of the Covenant be debarred from insisting on their rights as neutral states.

[2] The words "committed an act of war against all other Members of the League" in paragraph 1 of Article 16 are given an authoritative interpretation in Resolution No. 3 of the Assembly of October 4, 1921, which reads as follows, "The unilateral action of the defaulting state cannot create a state of war; it merely entitles the other Members of the League to resort to acts of war or to declare themselves in a state of war with a Covenant-breaking state; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war and restore peace by economic pressure."

[3] The rules of neutrality create certain rights and duties for neutrals in relation to belligerents and vice versa. In some cases the precise duties of neutrals are fixed, but in other respects they have liberty of action provided they treat both belligerents equally. Equal treatment of both belligerents is a fundamental principle and basis of the system of rules of neutrality in times of war.

In the present conflict all the Members of the League seem to have treated the position resulting from the simple text of Article 16 as being modified in accordance with the Resolutions of the Assembly of October 1921 (in particular, Nos. 1, 8, 9, 10 and 14) in the sense that, instead of automatic and immediate application by each Member of the League of the complete severance of economic relations indicated by the text of paragraph 1, the procedure is that the Council (in the present case the Council seems to have delegated its functions to a larger body comprising *inter alia* all the members of the Council) should propose what measures should be taken and the date when they should begin and that a series of particular measures might be taken possibly of gradually increasing intensity. Upon this basis it seems that a Member of the League who takes such action as the League recommends fulfils its obligations under Article 16 even though the action taken is less than the literal text of the Article seems to require. On the other hand, any Member of the League retains the right though not the obligation to do more than the Council recommends. (If this were not so, treaties of mutual assistance such as the Treaty of Locarno, which have been blessed by the League and regarded as fully in accord with the Covenant, would not be consistent with it.) Finally, a Member of the League who does not do as much as the League recommends for that particular Member is not fulfilling its obligations under the Covenant.

It will thus be seen that other Members of the League, without declaring war and themselves assuming the status of a belligerent, have the right to put into force against the Covenant-breaking state a whole series of measures ranging from the mildest form of economic pressure to allowing their territory to be used by troops operating against the Covenant-breaking state and even performing acts of force themselves against that state, all these measures being applied to one of the belligerents only, and with the intended effect of hampering that belligerent and favouring the state attacked.

All this is in complete contradiction with the fundamental principle of neutrality, and as the range of measures which a non-belligerent Member of the League has thus the right and possibly the duty to adopt under Article 16 may potentially cover the whole sphere which is covered by the rules of neutrality, it seems to follow from this that the Covenant-breaking state which has agreed to Article 16 has no legal right to demand from other Members of the League the observance towards itself of the rules of neutrality.

The other members of the League, having an obligation towards each other and the attacked state to take some measures of economic pressure against the Covenant-breaking state and in favour of the state attacked,—there is an obligatory minimum—cannot declare themselves neutral and observe in all respects the rules of neutrality even if they wish to do so. On the other hand, there is no reason why a Member should not in fact apply the rules of neutrality on a *de facto* basis in matters not covered by the economic measures which it is under a duty to put into force or which it is in fact putting into force. From this it may be deduced that the Members of the League have the right but not the duty to apply the rules of neutrality in their relations with the Covenant-breaking state to the extent that such application is not inconsistent with their obligations towards other Members of the League under Article 16 as interpreted by the 1921 Resolutions and as fixed in the particular case by the measures recommended by the Council. Finally, in no sphere would they be entitled to

accord to the Covenant-breaking state treatment more favourable than that which would result from the application of the rules of neutrality.

It is on the basis of the above reasoning that the application by Members of the League in the Italo-Abyssinian conflict of some of the rules of neutrality has to be explained and justified; for instance the application to Italian vessels in British and French ports of the Rules of Hague Convention No. 13 and the internment in the Anglo-Egyptian Sudan of an Italian military aeroplane and its crew. This action was queried in the House of Commons on October 23, 1935. Mr. Eden explained the views of His Majesty's Government in terms similar to those stated above.[1] It seems therefore possible to define the effect of Article 16 upon neutrality in the following two legal propositions: (i) a belligerent Covenant-breaking state has no right to require the observance by other Members of the League of the rules of neutrality towards it, although such Members of the League have not become belligerents; (ii) other Members of the League have the right but not the duty to apply towards the Covenant-breaking state such of the rules of neutrality as are not inconsistent with their obligations under Article 16 of the Covenant as interpreted by the Resolutions of the Assembly of 1921, and the recommendations of the League in regard to the particular case. They cannot in any matter accord to the Covenant-breaking state treatment more favourable than that which would follow from the application of the rules of neutrality.

[1] Mr. Eden's statement was as follows: "I would now like to try to answer some of the criticisms which have been made and to deal with some of the points which I have still left unanswered. The Leader of the Opposition referred yesterday to instructions which had been given by the authorities in British Colonies and Protectorates to apply towards Italian warships and auxiliaries a rule of the Hague Convention No. 13. Owing to the fact that this Convention is one which defines the duties of a neutral as regards these matters, the Right Hon. Gentleman seemed to infer—and I make no complaint, because it is a natural inference—that His Majesty's Government had made something equivalent to a declaration of neutrality. That is, however, a complete misunderstanding of the position, which I will endeavour to explain in a very few words. If His Majesty's Government had regarded themselves as neutrals they would have taken the regular step of issuing a proclamation of neutrality. No such step has been taken. I quite agree that such action would be inconsistent with their duty under Article 16 of the Covenant in a case where Article 16 was to become effective. We do not consider that any Covenant-breaking state has any legal right to require the observance by other Members of the League of any of the laws of neutrality. On the other hand, any departure from the rules to the detriment of the Covenant-breaking state, is action, the House will appreciate, in the nature of a sanction, which, therefore, in accordance with our oft-declared policy, can only be taken in common with all other nations of the League at Geneva. In the present case (i.e. the matter of treatment of warships and auxiliaries) there has been as yet no collective decision, and Members of the League have therefore the right to apply the rules of the Hague Convention on a purely *de facto* basis. To do less would be to treat the Covenant-breaking state more favourably than if no breaking of the Covenant had taken place. We found that immediate instructions had to be given to our authorities to guide their actions, and for the reason I have given no other course seemed to be possible except to instruct them to apply the Hague Convention rule on a *de facto* basis."

ARTICLE 16 (3) OF THE COVENANT

Mutual Support in Case of Attack by Covenant-breaking State

The communication from the Government of the United Kingdom to the Chairman of the Co-ordination Committee of the League of Nations of January 22, 1936, which has been published as a White Paper,[1] and the notes from other Governments which are published with it, render it possible to place on record another point of importance in connexion with the interpretation of the Covenant. Article 16 (3) provides as follows:

"The Members of the League agree, further (i) that they will mutually support one another in the financial and economic measures which are taken under this Article in order to minimize the loss and inconvenience resulting from the above measures, (ii) *that they will mutually support one another in resisting any such measures aimed at one of their number by the Covenant-breaking state*, and (iii) that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League."

This paragraph of the Covenant appears therefore to provide for three different obligations. Proposal No. 5 of October 19, 1935, of the Co-ordination Committee[2] was intended to give effect to the first of these obligations, and it is not intended to deal with this point here. The application of the third provision has not arisen in the Italo-Abyssinian dispute. It is the second point with which it is now desired to deal.

The meaning of this provision seems to depend on two points, (*a*) what is the nature of the mutual support which is here referred to? and (*b*) what is the nature of the special measures aimed, &c., by the Covenant-breaking state against which this support is to be given? It may be argued on the one hand that the word "measures" is the same word as that used for the economic and financial measures in point (i) of the paragraph, and that in any case "measures" is rather a curious word by which to describe an armed attack. From this the conclusion may be drawn that only economic measures are referred to and only economic support is meant, and in support of this argument the whole scheme of Article 16 may be invoked, since the article makes economic support to an attacked state obligatory but military support optional. If there is no undertaking to afford military support to a Member of the League which is attacked, in the first place, why should there be an undertaking to afford military support to another Member of the League who is attacked during the process of the operation of sanctions? The following answer may be made to these arguments: if point (ii) of Article 16 (3) only refers to economic support against economic measures, it adds little to point (i). The draftsmen of Article 16 knew nothing of the 1921 Resolutions and therefore were contemplating a Covenant-breaking state which was automatically and immediately subjected to the complete severance of all economic relations envisaged by the text of paragraph 1 of Article 16. In this state of affairs the Covenant-breaking state would be unable to launch any economic measure against a Member of the League participating in sanctions, and therefore the framers

[1] 1936 Cmd. 5072.

[2] See Cmd. 5071, p. 47. *The dispute between Ethiopia and Italy. Documents and Proceedings of the League of Nations.*

of the Covenant could not be referring to such measures. Further, other Members could not assist the attacked state by economic action against the aggressor, because under the Covenant as drafted they would be taking all economic action already: it is military action or nothing. (Note also the division of the French text into separate sentences.) Finally, very strong reasons can be advanced for holding that there should be a compulsory undertaking to afford military support to another Member of the League who is attacked because of its participation in sanctions, even if the Covenant makes military support to the state originally attacked optional only. The state participating in sanctions was no party to the original quarrel which brought about the war and owes its misfortunes purely to its co-operation in the League machinery.

At any rate it seems clear that it is the latter view which has prevailed. His Majesty's Government's communication to the Co-ordination Committee shows that the United Kingdom took the view that the provisions included military support against military measures; that the French Government agreed; and subsequently the Governments of Greece, Turkey, and Yugoslavia stated that they accepted the same interpretation of the Article and in consequence thereof certain discussions took place as to the manner in which this support should be given if it were required as a result of the Italo-Abyssinian conflict. There are also letters which seem to indicate that the Czechoslovak, Roumanian, and Spanish[1] Governments take a similar view of the interpretation of the provision of the Covenant.[2]

The conflict in connexion with which this communication to the League Co-ordination Committee was made was one where no military sanctions had been taken against the Covenant-breaking state and the Members of the League were confining themselves to those economic sanctions which had been recommended by the League. If in these circumstances the Covenant-breaking state attacks a Member of the League it is clear that the obligation of military support arises, if Article 16 (3) (ii) covers military support at all. It is possible, however, to envisage other circumstances. Supposing that one of the Members of the League, although there has been no League recommendation to this effect, takes military measures against the Covenant-breaking state in support of the state attacked. It is perfectly entitled to do so, though under no obligation to do so under Article 16. Can it, however, in these circumstances call upon the other Members of the League for military support under point (ii) of Article 16 (3) if the Covenant-breaking state then invades it? The application of the provisions to a Member of the League who takes measures which have not been recommended by the League, justifiable though they may be, is in fact excluded by a passage in a communication from the French Government which is quoted

[1] The Spanish note is, however, rather non-committal.

[2] There is also a communication from the Italian Government which seems, however, to differ not so much upon the question of the interpretation of the provisions of the Covenant but as regards its application to the particular case. The Italian objections are based on the contentions (i) that Italy had not violated the Covenant; (ii) that the economic sanctions applied against Italy were not taken in accordance with any decision of the League of Nations, and (iii) that the United Kingdom would not in any case be able to invoke the protection of Art. 16 (3) because the movements in the Mediterranean of the British fleet were not carried out as a result of a League recommendation.

in the memorandum presented to the Co-ordination Committee.[1] Further, since the Covenant-breaking state is almost certain to aim special measures at a single Member taking military measures alone, any other view would have the result that one Member of the League, by taking military measures against the Covenant-breaking state, could, by its own isolated action, involve all the other Members of the League in compulsory military sanctions although the scheme of Article 16 is to render military measures optional. Where military measures have been taken against the Covenant-breaking state by one or two Members of the League, but in accordance with the recommendation of the League, there is much to be said for and against the application of the obligation of point (ii) of Article 16 (3), and the United Kingdom Government's communication to the League hardly throws any light on this class of case.

THE INTERNATIONAL LABOUR ORGANIZATION

The Eight States of Chief Industrial Importance

The advantage of expressing treaty provisions defining the composition of international bodies in a manner which makes it possible for the composition of such bodies to be changed without a formal revision (a process which involves ratification by all parties) of the relevant treaty, was recently illustrated in a striking manner when changes were made in the list of the eight states of chief industrial importance who are entitled as of right to appoint government representatives upon the Governing Body of the International Labour Office. At the time when the elected members of the Governing Body were re-elected in June 1934, the eight states of chief industrial importance were: Belgium, Canada, France, Germany, Great Britain, India, Italy, and Japan. Shortly afterwards, the acceptance of membership in the Organization by the United States of America and the acquisition of membership in the Organization by the U.S.S.R. (as a consequence of admission to the League of Nations) made changes in the list necessary, as both the United States and the U.S.S.R. were obviously and unquestionably states of chief industrial importance. The Governing Body of the International Labour Office appointed its officers as a committee to review the situation in October 1934, and on the basis of their report declared in January 1935 that the following should, as states of chief industrial importance, be entitled as from April 1935 to nominate members of the Governing Body: France, Germany, Great Britain, India, Italy, Japan, U.S.A., and U.S.S.R. Belgium, one of the states which thus lost the right to nominate a member, accepted this finding. Canada, the other displaced state, expressed disagreement, on the double ground that the Governing Body was not competent to make changes in the list, and that the list could not in any case be changed except at the expiration of one of the three-year periods for which elected members of the Governing Body are chosen. Canada did not, however, submit this objection to the Council of the League of Nations, which under Article 7 of the Constitution of the Organization

[1] "The French Government considers Article 16 as implying complete solidarity of each of the Members of the League of Nations in respect of that one of them which may have been attacked by the Covenant-breaking state if this attack has been clearly brought about by the *application of the provisions of the said article, the execution of which shall have been decided upon in common.*"

is competent to settle any dispute as to which are the states of chief industrial importance. The revised list became operative, and when in October 1935 a place among the eight states became vacant owing to Germany's withdrawal from the Organization, Canada accepted nomination by the Governing Body as one of the eight states. It is therefore legitimate to draw from the practice followed some conclusions which are of interest to the international lawyer as furnishing precedents likely to be followed in any future cases:

(*a*) the Governing Body must now be regarded as the body competent in the first instance to make any necessary changes in the list of states of chief industrial importance, it always being open to any state which considers itself aggrieved to appeal to the Council of the League of Nations under Article 7 of the Constitution of the Organization;

(*b*) it must be recognized that in exceptional cases, such as cases in which an important industrial state has entered or left the Organization, the list may be changed by the Governing Body even during the term for which elected members of the Governing Body have been chosen, despite the fact that if the list is changed at such a time a displaced state has no opportunity of seeking representation on the Governing Body through election.

C. W. J.

The Labour Conference of American States

The Labour Conference of American States which are Members of the International Labour Organization met at Santiago de Chile from January 2 to January 14, 1936; the conference marks an important stage in the process of making the International Labour Organization effectively universal. There has been a notable increase in the interest in the Organization taken in American countries in recent years. The United States became a member in 1934. Canada in 1935 during the closing months of Mr. Bennett's government pursued a policy more active in ratifying conventions than ever in the past. Argentina, Brazil, and Mexico have recently ratified conventions for the first time, and states such as Chile, Cuba, and Uruguay have more than thirty ratifications each to their credit. Of the 103 ratifications registered at Geneva during the two years preceding the opening of the Santiago Conference, 73 came from the Americas. On the other hand there have been cases in which the degree of compliance with ratified conventions has not been altogether satisfactory, and a number of Latin-American countries continued not to be represented at the annual sessions of the International Labour Conference by complete delegations of government, employers', and workers' representatives; this was owing largely to difficulties of distance and expense, but partly also to difficulties of selection as regards employers' and workers' representatives, and to other reasons. Simultaneously there was a feeling in certain quarters that the International Labour Office had not given sufficient attention to certain social problems conceived of as being specifically American: in 1933 the Seventh International Conference of American States, meeting at Montevideo, had adopted a resolution for the creation of an Inter-American Labor Office independent of the International Labour Organization though pledged to co-operate with it. This Institute was to have begun activity as a research body and its powers as regards the adoption of conventions were to have been fixed by the Eighth International Conference

of American States which is due to meet at Lima in 1938. Certain important governments, however, including those of the United States, Brazil, and Chile, had gone on record at Montevideo as being opposed to the establishment of an independent Inter-American Labor Institute, on the ground that the existence of such a body would involve useless duplication of effort, and no action had been taken on the basis of the resolution by the Pan-American Union.

Such was the background when in June 1935 the Chilean Government, through its representative at the Nineteenth Session of the International Labour Conference, Mr. Garcia Oldini, invited the International Labour Organization to convene at Santiago a conference of the American Members of the Organization for the discussion of problems of special interest to them. The Governing Body immediately accepted the Chilean invitation and placed two items upon the agenda of the Conference. These were—(1) consideration of the existing position as regards the ratification and application of international labour conventions by American states, with special reference to conventions relating to social insurance and the conditions of employment of women and children; and (2) consideration of proposals for future action by the International Labour Conference upon topics of special interest to American states. The competence of the Conference was restricted by the terms of its convocation to the adoption of resolutions addressed to the International Labour Organization. Each American Member of the Organization was invited to be represented by two government delegates, one employers' delegate, and one workers' delegate, plus technical advisers. Of the twenty-one American Members of the Organization nineteen accepted the invitation, only Salvador and Honduras being absent, and, of the nineteen members which attended, ten were represented by complete delegations of government, employers', and workers' delegates. Costa Rica, which is not a Member of the Organization, was represented by an observer. An encouraging feature was the number of cases in which states which have habitually been represented at the annual sessions of the International Labour Conference by diplomats stationed in Europe were represented at Santiago by leading officials from the departments directly responsible for social legislation and administration. The Governing Body of the International Labour Office was represented at the Conference by its Chairman and two members from each of the three groups in the Governing Body; the Director of the International Labour Office, Mr. Harold Butler, was Secretary-General of the Conference; and the Secretariat of the Conference was built around a nucleus consisting of officials of the International Labour Office. The Conference, which was honoured at its opening sitting by the presence of President Alessandri accompanied by his cabinet, elected as its President the Chilean Minister of Labour, Don Alejandro Serani.

The discussions of the Conference related primarily to matters which are not generally regarded by international lawyers as being of direct concern to them, but some of the more important resolutions adopted deserve a passing mention. The suggested Inter-American Labor Office was discussed, and it soon emerged that the workers' delegates were strongly opposed to the project and that the general current of feeling among government delegates was also against it. The outcome was that the workers' group and the delegates of Cuba and Argentina, both countries which at Montevideo had been in favour of the suggested Institute, proposed resolutions favouring what is in substance an alternative programme,

an intensification of the activities of the International Labour Office in the Americas; a combined text fusing these three resolutions was adopted unanimously by the Conference. The text of this resolution requests the periodical convocation of conferences similar to that of Santiago, an increase in the number of nationals of American countries appointed as members of the technical committees of the Organization, an increase in the number of American officials employed in the International Labour Office, an increase in the number of Correspondence Offices and Correspondents of the I.L.O. in American countries, and increased attention to American conditions and needs in programmes of investigations and publications. Other resolutions request investigations, to be followed where possible by appropriate international action, into the problems of migration between European and American countries, the standard of life of the indigenous populations of the American continent, nutrition, the truck system, and the general establishment of the administrative, technical, and research bodies necessary to secure the effective application of international conventions and of labour law in general. Important resolutions proposed by the Mexican delegation relate to cost of living inquiries in American countries, agricultural statistics in American countries, and the special conditions affecting the conditions of agricultural work in America. The Social Insurance Committee of the Conference adopted, and the Conference itself approved, a detailed statement of social insurance policy based upon the conventions and recommendations upon the subject already adopted by the International Labour Conference. Among the proposals for further action made by this committee two are of special interest, a proposal that the International Labour Office should be more fully equipped to assist American countries in establishing upon a sound basis the actuarial calculations and financial estimates of their insurance schemes, and a proposal that the Office should inquire internationally into the problem of the investment of the reserves of social insurance institutions. The Committee on the Employment of Women and Children submitted resolutions of a rather different character urging the ratification of existing conventions, advocating principles and policies which in some respects go beyond existing conventions and recommendations, and requesting the revision of the four existing conventions on the age of admission to employment, with a view to increasing the minimum age from fourteen to fifteen.

When there are added to these resolutions others of less significance and the intangible but important results of having for the first time stimulated throughout Latin-America the degree of interest which nothing but the fact of a conference being held on the spot can provoke, it will be appreciated that the Santiago Conference accomplished a considerable amount during the brief fortnight of its existence. Nothing which it did will involve any immediate modification of or development in the rules of international law, but it is of significance to international lawyers for at least three reasons. It has probably succeeded in preserving for the future the universality of international social legislation against the danger of continental rifts, it has certainly given a stimulus to the ratification of existing international labour conventions, and the action initiated by it is likely to lead in due course to important developments in international social legislation through the adoption of new international labour conventions.

C. W. J.

The Maintenance of Migrants' Pension Rights Convention, 1935

The Maintenance of Migrants' Pension Rights Convention, which was adopted by the International Labour Conference at its Nineteenth Session on June 22, 1935, is in some respects of greater interest to international lawyers than any other international labour convention, though it is unlikely, for reasons which were explained to the International Labour Conference by the British Government Delegate at the time of its adoption, to be ratified by Great Britain in any foreseeable future. This special interest derives not merely from the subject-matter of the convention but from the fact that in dealing with that subject-matter it was necessary to consider several general questions of international law which were of special importance in connexion therewith.

The general purpose of the convention is to protect migrant workers against prejudice to their rights under social insurance schemes resulting from interruptions in their insurance careers due to migration, and the method adopted to achieve this end is that known as totalization. This method has three characteristic features:

(1) each insurance institution with which the insured person has been insured, for the purpose of ascertaining whether he fulfils all preliminary conditions of entitlement to benefit which imply a certain duration of insurance, takes into account not only the insurance periods spent with that institution but all insurance periods spent with institutions of countries parties to the convention (Article 2 of the convention);

(2) when the risk matures, pensions are payable concurrently but independently by the different institutions with which the migrant has been insured (Article 3); and

(3) the rate of pension payable by each institution is calculated in a manner which ensures an equitable apportionment between the various institutions of the total pension liability (Article 3).

The convention also includes detailed provisions relating to the removal of residence conditions for the payment of pensions (Articles 10–12), and to mutual assistance between the authorities and insurance institutions of the different countries in the administration of the scheme (Articles 14–16).

The questions of general interest specially considered in connexion with this convention were—

(*a*) the extent to which some of the parties to a multilateral convention may withdraw their mutual relationships from its operation;

(*b*) the extent to which international conventions are or can properly be made of retroactive application;

(*c*) the effect of denunciation of an international convention upon private rights acquired or in course of acquisition thereunder; and

(*d*) the most appropriate technique for the international co-ordination of administrative measures required for the detailed application of highly technical conventions.

In respect of each of these questions provisions appropriate to the subject-matter of the convention are included among its terms—

(*a*) contracting-out is permitted subject to an equivalence condition (Article 19).

(*b*) the convention applies retroactively to old claims and old insurance

periods but only as regards the future service of pensions based thereupon (Article 21).

(*c*) denunciation of the convention does not affect the liabilities of insurance institutions in respect of matured claims (Article 22).

(*d*) provision is made for a commission which is to assist the parties in applying the convention by making at their request "recommendations as to the manner in which it shall be applied" (Article 20).

It is submitted that these provisions are of considerable interest to the student of international legislative technique since questions of this kind, which are of increasing importance in view of the growing bulk of international legislation, are likely to give rise to considerable difficulty unless adequate foresight is shown by those responsible for the drafting of such legislation.

C. W. J.

A POINT ON "CLASSIFICATION"

Some of our readers may remember that Mr. Beckett in his article on Classification in Private International Law which appeared in Volume XV of the *Year Book* (1934)—see pp. 76–7 of that volume—criticized a decision of the German Supreme Court given in the year 1882. It is of interest to put on record that this decision now "must be regarded as overruled".

Mr. Mann, of the firm of Rheinstrom, Werner & Mann, has been good enough to supply the following details:

"The decision of the German Supreme Court in RGZ 7, 21 (23.1.1882) which was preceded by RGZ 2, 13 (8. 5. 1880) and followed by RGZ 24, 383 (18. 5. 1889) must be regarded as being overruled. An opposite view had already been expressed by the Supreme Court in *Juristische Wochenschrift 1932*, 3823 (13. 1. 1932), and the Supreme Court has now had the opportunity to re-examine the whole problem in a case of an action of the holder of a bill of exchange against the indorsee whose obligations, governed by English law, were statute-barred by German, but not by English law: RGZ 145, 121 (6. 7. 1934).

"The Court arrived at the result 'that those provisions of a foreign country by which limitation of actions is regarded as part of the law of procedure and which, consequently, are always being applied by a foreign court, have at the same time the character of substantive rules which, in connexion with Private International Law, corresponds to the effects of the substantive character of the limitation of actions in German law. This being so, the Court is not prevented from applying the foreign provisions as to limitation of actions, and therefore from reaching the result that the claim of the plaintiff is not statute-barred.'

"The reasons which the Court gives are twofold:

(1) The Court maintains that the question whether limitation of actions is governed by the law otherwise to be applied to a given case, depends on the preliminary question whether limitation of actions belongs to the sphere of substantive law or to that of procedure. 'This preliminary question is to be decided by German law. According to German law, limitation of actions is part of substantive law.' Therefore a judge, in applying his own rules and notions of private international law, should not disregard rules of foreign laws as to limitation of actions for the only reason that according to the classification of foreign law limitation of actions belongs to the law of procedure.

(2) 'But apart from this, the nature and purpose of the German and English rules relating to limitation of actions are akin, notwithstanding different constructions.' The Court went on to compare the respective rules of the two countries, and found that, whatever the notional conception may be, in both laws the rules as to limitation of actions have both a substantive and procedural meaning and are therefore, fundamentally, not so very different."

U.S.A. AND SOVIET RUSSIA—A PROTEST[1]

At the Seventh All World Congress of the Communist International at Moscow in August 1935, a programme of attack upon the economic and political system of the United States, proposed by the American delegates, was endorsed by the Congress. Commenting upon the programme, *Pravda*, the newspaper organ of the Russian Communistic party, declared that "Capitalism must be pushed forcibly into its grave". The Government of the United States, considering these proceedings to be a "flagrant" violation of certain pledges which the Soviet Government had given it on November 16, 1933, and which were understood to be one of the conditions upon which the American Government had recognized the Soviet Government, addressed on August 25 "a most emphatic protest" to the Soviet Government against "activities involving interference in the internal affairs of the United States which have taken place in the territory of the Union of Socialist Soviet Republics". The note set forth in full the pledge referred to, which was in the form of a letter dated November 16, 1933, addressed by Maxim Litvinov, People's Commissar for Foreign Affairs of the U.S.S.R., to President Roosevelt. This letter stated that "coincident with the establishment of diplomatic relations between our two Governments, it will be the fixed policy of the Government of the Union of Soviet Socialist Republics", among other things,

"4. Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions."[2]

The note which was presented by the American Ambassador called particular attention to the above paragraph of the pledge of November 16, 1933, and asserted that, inasmuch as the aim and activity of the Congress of the Communist International could not be unknown to the Soviet Government, it did not seem necessary to adduce evidence to show what its aim was with respect to the political or social order of the United States or to quote from its published proceedings to show its activity relative to the internal affairs of the United States and its

[1] It appears that the British, Italian, and Latvian Governments protested orally to the Soviet Government during the Session of the Congress of the Third International against certain of its activities.

[2] The text of this letter with other communications and documents relative to the recognition of the Soviet Government by the United States may be found in the *American Journal of International Law*, Vol. XXVIII (1934), Official Documents, pp. 3 ff. It may also be found in my note in the *Year Book* for 1935, p. 172.

formulation of policies to be carried out in the United States by the communist organization. The note then continued:

"As I have pointed out to the People's Commissar for Foreign Affairs when discussing earlier violations of the undertaking of November 16, 1933, the American people resent most strongly interference by foreign countries in their internal affairs, regardless of the nature or probable result of such interference, and the Government of the United States considers the strict fulfilment of the pledge of non-interference an essential pre-requisite to the maintenance of normal and friendly relations between the United States and the Union of Soviet Socialist Republics.

"The Government of the United States would be lacking in candour if it failed to state frankly that it anticipates the most serious consequences if the Government of the Union of Soviet Socialist Republics is unwilling, or unable, to take appropriate measures to prevent further acts in disregard of the solemn pledges given by it to the Government of the United States."

On August 27 the Acting People's Commissar for Foreign Affairs handed to the Ambassador a reply to the above protest. The reply emphasized "with all firmness" that the Soviet Government regarded "with the greatest respect" all obligations undertaken by it, "including naturally the mutual obligation concerning non-interference in internal affairs provided for in the exchange of notes of November 16, 1933 . . ." It stated, however, that: "There are contained no facts of any kind in your note of August 25 which could be considered as a violation on the part of the Soviet Government of its obligations." It continued:

"On the other hand it is certainly not new to the Government of the United States that the Government of the Union of Soviet Socialist Republics cannot take upon itself and has not taken upon itself obligations of any kind with regard to the Communist International.

"Hence the assertion concerning the violation by the Government of the Union of Soviet Socialist Republics of the obligations contained in the note of November 16, 1933, does not emanate from obligations accepted by both sides, in consequence of which I cannot accept your protest and am obliged to decline it."

No further diplomatic exchanges took place. But on August 31 the Secretary of State released for publication in the newspapers of September 1 a "statement" which reviewed the background of recognition by the United States of the Soviet Government, pointing out that for sixteen years the United States had withheld such recognition "mainly for the reason that the Soviet Government had failed to respect the right of this Nation to maintain its own political and social order without interference by organizations conducting in or from Soviet territories activities directed against our institutions". He then reviewed the circumstances in which the United States had accorded recognition, "after various stipulations in writing had first been carefully drafted and agreed upon by representatives of the two Governments". One of the most important provisions of the agreement thus reached, said the Secretary of State, was the pledge (contained in paragraph 4 of the note of November 16, 1933) of the Soviet Government not to permit persons or groups on its territory to engage in efforts or movements directed toward the overthrow of our institutions. He added, "The language of the above-quoted paragraph irrefutably covers activities of the Communist International, which was then, and still is, the outstanding world communist organization, with head-quarters at Moscow."

The Secretary's statement continued:

"In its reply of August 27, 1935, to this Government's note of August 25, 1935, the

Soviet Government almost in so many words repudiates the pledges which it gave at the time of recognition that 'it will be the fixed policy of the Government of the Union of Soviet Socialist Republics. . . not to permit . . . and to prevent' the very activities against which this Government has complained and protested. Not for a moment denying or questioning the fact of Communist International activities on Soviet territory, involving interference in the internal affairs of the United States, the Soviet Government denies having made any promise 'not to permit . . . and to prevent' such activities of that organization on Soviet territory, asserting that it 'has not taken upon itself obligations of any kind with regard to the Communist International'. That the language of the pledge, as set out above, is absolutely clear and in no way ambiguous and that there has been a clean-cut disregard and disavowal of the pledge by the Soviet Government is obvious."

The Soviet Government by indicating in its reply to the United States protest, "an intention not only to disregard its promise 'to prevent' such activities as those complained of", the Secretary of State said had "struck a severe blow at the fabric of friendly relations between the two countries".
The statement closed with the warning that:

"If the Soviet Government pursues a policy of permitting activities on its territory involving interference in the internal affairs of the United States, instead of 'promoting' such activities, as its written pledge provides, the friendly and official relations between the two countries cannot but be seriously impaired. Whether such relations between these two great countries are thus unfortunately to be impaired and co-operative opportunities for vast good to be destroyed, will depend upon the attitude and action of the Soviet Government."[1]

James Wilford Garner.

MARRIAGE LAW

The Effect of Domicil in Nullity Cases—Some Canadian Decisions

In Canada as in England there seems to be no clear doctrine governing this matter. In 1929[2] a Saskatchewan court held that it could entertain a suit for a declaration of nullity of a marriage celebrated within the province on the grounds of impotence, quite apart from the domicil of the defendant husband, although it must be added that it is possible that the defendant, though absent from the province, might still have had a legal domicil there. In 1932[3] a New Brunswick

[1] In a caustic criticism of the Russian activities referred to above, Professor Charles C. Hyde (*American Journal of International Law*, October 1935, p. 661) considers some of the further measures which the United States might take against the Soviet Government in case it persists in violating its pledges. The withdrawal of the recognition accorded in 1933 would, he thinks, be open to technical objections. But the severance of diplomatic relations could be resorted to as a means of making "clear to the Soviet mind the determination of the American people to frustrate foreign interference with their domestic affairs. Such action would mark no cessation of recognition of the Soviet régime as the government of Russia. But it would proclaim solemnly to all the world the American sense of outrage in a condition permitted to prevail on Russian soil that was subversive of the safety of the United States. It would not be relished at Moscow; it would put other countries on their guard against like interference; it would injure the prestige of a state that, like others, is not without a desire to enhance the esteem in which it is held beyond its own borders."

[2] *Reid* v. *Francis*, [1929] 4. D.L.R. 311.

[3] *Hinds* v. *McDonald*, [1932] 1. D.L.R. 96.

Court declared a marriage, celebrated there, null and void on the grounds of duress, although the husband in this case was admittedly domiciled in the West Indies. In 1934[1] in Ontario Mr. Justice Macdonnell in a much fuller judgment discusses this whole matter and comes to the conclusion that the court of the domicil alone has jurisdiction in cases of nullity involving impotence. The facts were as follows: in 1927 the plaintiff and defendant, both domiciled in Ontario, went to California and were married there. Then they returned to Ontario and cohabited there until 1933. In that year the wife went to Nevada and obtained a divorce on the grounds of cruelty. She then went on to California and obtained an annulment of the marriage on the grounds of her husband's impotence. She then returned to Ontario and remarried. Her former husband then sued for a divorce of the first marriage in the Ontario courts on the grounds of his wife's adultery. The question in issue was the validity of the decree of annulment granted by the Californian courts. Mr. Justice Macdonnell, because both parties were domiciled in Ontario, because the grounds for the alleged annulment were impotence, and because he was not satisfied that the degree of impotence or proof of impotence required by the Californian courts would satisfy the Ontario courts, decided that the Californian decree was not valid.

N. McK.

From these cases, the Canadian view seems to be that while there may be grounds for holding, in impotence cases, that the courts of the domicil alone have jurisdiction, this does not apply when the ground for bringing action is other than impotence.

NATIONALITY IN THE UNION OF SOUTH AFRICA

Nationality in the Union of South Africa having been a recent topic of debate in the Imperial and Union Parliaments, a statement of the Union Government's policy in regard thereto by the Minister of the Interior (the Hon. Mr. J. H. Hofmeyr) merits examination. Replying on February 13 to a debate on the Public Service Amendment Bill in the course of which the Leader of the Opposition had raised the question of nationality, the Minister postulated four principles.

In the first place, the Government accepts unreservedly the position as set forth by representatives of the whole Commonwealth in the report of the Imperial Conference of 1930, which adopted the report of the special Conference of 1929 dealing with nationality. Secondly, the Government stands firmly by the agreement arrived at by the 1930 Conference, in terms of which no amendment dealing with common status can be made save after consultation and in agreement with other members of the Commonwealth. Thirdly, the Government is satisfied that there is nothing in the existing nationality laws which is in principle inconsistent with the Union's sovereign independent status and that therefore no fundamental amendments of those laws are necessary. Fourthly, although certain anomalies are recognized to exist, the Government does not propose to introduce legislation to eliminate them until after the Imperial Conference which is to be held next year.

In elaborating these principles the Minister pointed out that the 1929 Confer-

[1] *Fleming* v. *Fleming*, [1934] 4. D.L.R. 90.

ence report clearly indicates that in each of the member States of the Commonwealth there is a distinct nationality and one nationality only—in South Africa, for instance, Union nationality—and that in addition there is a common status indicated by the term British subject, which implies in the case of nationals of a Dominion no form of subjection to Great Britain, but is based directly on common allegiance to the Crown. This common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth.

In examining the Minister's statement it has to be borne in mind that both the common status and Union nationality have been the occasion of Union legislation. When by the medium of Act 18 of 1926 the Union Parliament adopted Part II of the British Nationality and Status of Aliens Act, 1914–22, it not only made provision for uniformity of rules relating to naturalization but also, perhaps *ex abundantia cautelae*, re-enacted Parts I and III of the Imperial Act, with the result that apart from some minor divergencies the Imperial Act is reproduced in the Statute Book of the Union. However redundant such legislation may have been at the time of its enactment (since Parts I and III of the Imperial Act must have applied *ex proprio vigore* to the Union as to the rest of His Majesty's Dominions) the consequence is that the Union now possesses complete legislation of its own dealing with the common status of British subject. No action has, however, been taken in the Union to give effect to the Hague Convention on the nationality of married women, as has been done by the British Nationality Act, 1933, so that an anomaly exists in this connexion between the Imperial and Union legislation.

Union legislation relating to Union nationality is quite separate and distinct from that dealing with the common status and is to be found in Act 40 of 1927 as amended in certain minor directions. The terms employed in the Afrikaans version (which is the authoritative one, being signed by the Governor-General) distinguish clearly nationality and common status. Union National is denoted by "Unie staatsburger" (state citizen), whereas the equivalent of British subject is "Britse onderdaan". Moreover, although in the main the common status of British subject is a prerequisite to the acquisition of Union nationality, and although in general loss of British common status implies loss of Union nationality, yet loss of Union nationality can never in itself affect the common status, and exceptional cases can occur where Union nationality may exist unaccompanied by the possession of the character of British subject. For example, under Section I (*d*), a person can claim Union nationality by direct descent without restriction as to the number of generations for which he and his family have been detached from association with South Africa and although under the British Act he no longer is a British subject, provided he does not fall in the category of prohibited immigrant. This anomalous case can perhaps best be compared with that local naturalization disclosed in *Markwald* v. *Att.-Gen.*, [1920] I Ch. 348. The *de cuius* would enjoy full rights in the Union but have no common status elsewhere in the Commonwealth. Such a position is obviously an undesirable one when the common status and the common allegiance whence it flows are fast becoming the last legal links in the Commonwealth.

It seems certain that when the time comes for further legislation in relation to nationality, wherever qualifications are based on nationality that of the

Union will be specified to the exclusion of the common status. The increasing importance of the former will no doubt lead to a judicial exposition of certain difficulties which are apparent in the Act, notably in connexion with domicil, which is one of the tests of Union nationality acquired later than birth, and which is not defined in the Act. This in turn may lead to some modification of the Act, but there is no doubt that nationality in the Union will continue to be based on association with the territory of the Union, and for all practical internal purposes "Britse onderdaan" will be secondary to "Unie staatsburger".

E. E.

THE (AMERICAN) RESEARCH IN INTERNATIONAL LAW

Ever since the days of David Dudley Field,[1] the possibility of a codification of international law has been a favourite topic in the United States, and at times it has figured in political discussions. When the prospect for an international conference devoted to codification became definite in 1927, the legal profession quite naturally felt itself called upon to contribute in every possible way to the success of such a conference. To this end, the Faculty of the Harvard Law School invited a number of lawyers and professors, including most of the men actively interested in international law, to organize a so-called *Research in International Law*, for the purpose of making a careful study of the three subjects which had been placed upon the agenda of the prospective conference. Funds were obtained from private sources, and under the chairmanship of the late George W. Wickersham, who had served as a member of the League of Nations Committee of Experts on Codification, the *Research* devoted two years to this task. Following the methods of the American Law Institute, a reporter was named for each subject; he was assisted by advisers, and general responsibility was assumed by an advisory Committee. Mr. Richard W. Flournoy, Jr., of the Department of State, served as reporter on the law of Nationality, Professor Edwin M. Borchard of Yale University on Responsibility of States, and Professor George Grafton Wilson of Harvard University on Territorial Waters. The three draft conventions, with elaborate comments, were published in 1929, and were republished (with the same pagination) in a special supplement of the *American Journal of International Law*.[2] In 1930 the *Research* published a collection of the nationality laws of various countries.[3]

In 1929 the *Research* decided to undertake a second phase of its work, to deal with four additional subjects which had been pronounced to be "ripe for codification" by the League of Nations Committee of Experts: viz. Diplomatic Privileges and Immunities, with Professor Jesse S. Reeves of the University of Michigan as reporter; Legal Status of Consuls, with Professor Quincy Wright of the University of Chicago as reporter; Competence of Courts as to Foreign States, with Professor Philip C. Jessup of Columbia University as reporter; and Piracy, with Professor Joseph W. Bingham of Stanford University as reporter. The four draft conventions on these subjects, which appeared in 1932, were

[1] David Dudley Field, *Outlines of an International Code* (New York, 1876).

[2] Vol. XXIII, 1929.

[3] *A Collection of Nationality Laws of various Countries*, edited by Richard W. Flournoy and Manley O. Hudson. Washington: Carnegie Endowment for International Peace 1930.

also published in supplements to the *American Journal of International Law*.[1] With them, the *Research* published a collection of national laws on piracy; and separately a collection of the diplomatic and consular laws and regulations of various countries.[2]

Despite the very limited success achieved at The Hague in 1930, the work of the *Research* has been continued. A third phase was devoted to three subjects: Extradition, with Dean Charles K. Burdick of Cornell University as reporter; Jurisdiction with respect to Crime, with Professor Edwin D. Dickinson of the University of California as reporter; and the law of Treaties, with Professor James W. Garner of the University of Illinois as reporter. Draft conventions on these subjects, with comments and collections of relevant texts, were published in 1935, appearing also as supplements to the *American Journal of International Law*.[3]

A fourth phase of the work of the *Research* is now in progress, devoted to the subjects of Judicial Assistance, Neutrality, and Recognition of States.

The record of the *Research* is chiefly interesting, perhaps, because it has demonstrated to those engaged in its work the usefulness of independent co-operative effort directed toward the clarification and improvement of international law. Apart from this feature, however, the publications of the *Research* have value. Having been made quite generally available, they furnish to writers, to students, and to practitioners starting-points for further investigation of the subjects dealt with, and even if the suggested solutions of problems are not accepted, it seems unlikely that they will be wholly ignored in the immediate future.

It is pleasant to observe that in the recent case in the Judicial Committee of the Privy Council *In re a Reference under the Judicial Committee Act 1833, In re Piracy Jure Gentium*,[4] the "most valuable treatise on the subject of piracy contained in the work of Harvard Law School" is referred to with warm commendation.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

The Institute has displayed considerable activity during the past year.

As readers of the *Year Book* are aware, the Institute was founded and endowed by the Italian Government under the auspices of the League of Nations, and works in close co-operation with the organs of the League. It is presided over by a Governing Body appointed by the Council of the League; the Italian member of the Governing Body being *ex officio* chairman.

The present chairman is M. Mariano d'Amelio, President of the Cour de Cassation in Rome. The English member of the Governing Body is Sir Cecil Hurst. The head-quarters of the Institute are situated at the Villa Aldobrandini, 28 Via Panisperna, at Rome.

The procedure usually adopted when the Institute takes up a question is that

[1] Vol. XXVI, 1932.

[2] *A Collection of the Diplomatic and Consular Laws and Regulations of various Countries*, 2 vols., edited by A. H. Feller and Manley O. Hudson. Washington: Carnegie Endowment for International Peace, 1933.

[3] Vol. XXIX, 1935.

[4] [1934] A.C. 586; 51 *T.L.R.* 12.

the members of the Secretariat collect all the information available as to the law in force in the various countries and prepare a comprehensive document called an "Étude" summarizing the material collected and annexing to it the text (with a French translation attached) of the laws in force in the various countries.

These "Études" in some cases exceed over 100 pages of roneoed paper and constitute veritable mines of information.

The subject is then taken under examination by a committee of experts drawn from different countries. The task of the committees is to endeavour to frame a scheme in the form of a draft uniform law which should ultimately be made binding in the countries which accept it through the machinery of a treaty

When the committee has finished its task and has prepared the draft of a uniform law, the draft comes before the Governing Body, and, if approved, is communicated to the Council of the League at Geneva for such action as the Council may consider to be appropriate.

In the course of the last year the preparation of two draft uniform laws has been completed. Both of them have been submitted to the Council of the League. On August 23 the Secretary-General transmitted copies of these draft laws to the Governments of all the Members of the League and asked for their observations or proposals by March 31, 1936.

The first draft dealt with the Sale of Goods, and regulates in states which adopt it all sales of movables (other than ships, debts, credits, and money) by persons established in different countries not regulated by the same law provided that the contract entails the transfer of goods from one country to another.

This draft was prepared by a Committee which had been meeting at intervals for four years. Two of the members of the Committee were Sir Cecil Hurst and Professor Gutteridge, the others being drawn from France, Germany, and Sweden.

The need of an international uniform law on the Sale of Goods was explained in an article by Professor Gutteridge in the 1933 volume of the *British Year Book* (Vol. XIV, p. 75).

A subsidiary question arising out of the work of the above committee and which is still under examination by the Institute is that of Bankers' Confirmed Credits—Letters of Trust. This subject has become of increased importance during the last few years in connexion with international trading and has been under examination by the Banking Group of the International Chamber of Commerce.

The second draft law submitted to the Council of the League by the Institute related to the liability of hotel-keepers for the goods of their guests. In these days when people so often spend their holidays in tours on the Continent any unification of the various laws prevailing in foreign countries is bound to be an advantage.

Among the other questions upon which committees of the Institute are at work is that of the civil liabilities of automobilists. The committee engaged on this subject includes Professor Dewar Gibb of Glasgow and Mr. Guy F. Johnson, Chairman of the Accident Offices Association, together with French Italian, Spanish, and German colleagues and with representatives of several of the more important international automobile organizations and of the Communications and Transit Section of the League of Nations.

Another committee which has now almost completed its task has been engaged on framing a scheme to unify the law relating to procedure in arbitrations between

private parties. This is a subject of considerable importance to international commerce. The Conventions concluded under the auspices of the League of Nations in 1923 and 1927 as to the validity of arbitration agreements and as to the execution of arbitration awards have covered a large part of the ground. The draft uniform law under preparation by the Institute deals with arbitration procedure. It is intended to apply where the parties in dispute reside habitually in different countries, or where they agree that the arbitration is to be governed by the uniform law. The British member of this committee has been Dr. Wortley, of the University of Birmingham.

The conclusion of contracts between absent parties—i.e. the conclusion of contracts by correspondence—is another matter at which a committee of the Institute is at work. The Institute was led to undertake this work because the committee which framed the draft law on the Sale of Goods had examined the question somewhat tentatively and had annexed to its report the draft of some articles on the subject. These articles were detached from the report by the Governing Body and were made the nucleus of the work of a new committee.

The unification of the law relating to the conclusion of contracts is an ambitious venture. In so many countries on the Continent the rule prevails that no contract is concluded until the person making the offer receives the acceptance by the person to whom the offer is made, that it may be found impossible within the near future to bring the various legal systems now in force nearer together. On the other hand, the studies made by the Secretariat of the laws in force in the different countries and the discussion of any draft prepared by the committee which is dealing with the question will be of great value, especially to those who give lectures in comparative law. The *rapporteur* for this question is Professor Meijers of Leiden and the English member of the committee is Sir Cecil Hurst, who is working in conjunction with Professor Goodhart, Professor Winfield, and Mr. Vesey FitzGerald in England.

Another question of which the Institute is about to undertake the examination in the hope of being able to prepare a draft uniform law is that of Reinsurance Agreements. It is intended first of all to take up the subject of reinsurance of liabilities under policies relating to fire and life insurance, leaving reinsurance of marine risks to be examined at a later date.

Another question which will shortly be submitted to a special committee is that of the framing of a draft uniform law relating to the enforcement of maintenance orders in foreign countries (*dettes alimentaires*). On the suggestion of the Section of the League of Nations dealing with social questions this subject was examined by the Institute some years ago, and the Secretariat began the work of collecting material as to the law in force in the various countries. The subject is now ripe for investigation by a special committee and it is hoped that this committee will be able to frame an acceptable scheme.

Apart from the above matters which are the subject of investigation and report by special committees of experts appointed *ad hoc*, the permanent staff of the Institute has furnished reports on various questions which have been referred to it for its opinion or for its advice by other organizations.

The "Office Internationale des Musées" at Brussels consulted the Institute with regard to the draft Convention dealing with the recovery of objects of artistic, historical, or archaeological interest which have been stolen, lost, or illegally exported.

The International Chamber of Commerce consulted the Institute as to the extent to which a universal Commercial Code might be feasible.

Various questions relating to the Berne Copyright Convention have been under discussion during the past year. In these discussions the Institute at Rome has participated.

There is, firstly, the revision of the Berne Convention by the Conference meeting at Brussels in 1936; secondly, the question of harmonizing the Berne Convention with the Havana Convention negotiated at the Pan-American Conference; thirdly, the question of protecting the rights of actors and musicians (*exécutants*) whose performances are broadcasted or recorded; next, that of protecting the interests of persons producing translations of books of which the original text is subject to copyright; and, lastly, that of protecting the interests of persons who help in the preparation and production of films.

At the request of the Economic Section of the League of Nations, the Institute is also undertaking a study of Clearing House Agreements, and a study of the proper meaning to be attributed in law to the terms "importer" and "exporter", a matter which has become one of considerable difficulty now that so many countries have set up organizations to control imports and exports.

The Secretary-General of the Institute, Signor Righetti, and his colleagues on the staff of the Institute are always willing to help by furnishing information with regard to the activities of the Institute, or by supplying copies of the documents prepared by the Secretariat.

THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW

This Academy is arranging to hold its Second Congress at The Hague in August 1937. The programme of the fifth section of the Congress is devoted to questions of international law and comprises the following topics:

1. Documentation in public international law.
2. The individual as a subject of public international law.
3. Different solutions of the problems of multiple nationality in Anglo-American and continental law.
4. The international status of companies formed for gain.
5. The immunities of foreign states engaged in private transactions.
6. The application of international conventions by national law.
7. The status of institutions of public international law in national law.
8. Comparative study of evidence to be received by international courts.

The Secretary of the Congress is Professor E. Balogh, 151bis rue Saint-Jacques, Paris V, and inquiries as to the work of the Congress may be addressed to him.

INSTITUTE OF INTERNATIONAL LAW

The Institute met this year in Brussels for a session lasting from the 17th to the 29th April, the venue being changed, shortly before the date of meeting, from Madrid.

The discussions were devoted to four topics—the rights of refugees and stateless persons, the interpretation of the Most-Favoured-Nation Clause, the recognition of new states and new governments, and the model form of an arbitration

clause for use in general international conventions, such as that of the Postal Union or for the protection of artistic or industrial property. The records of the meeting will, in accordance with the usual custom, appear in the issue of the *Annuaire de l'Institut*, but it may be noted here that Professor Gutteridge was elected an Associate and Sir John Fischer Williams a Member.

The Institute on this occasion was revisiting the country of its birth; it was, in fact, born in Ghent in 1873, with the Italian jurist Mancini as its first President and a member of the Belgian family which has so old and so honourable a place in the history of Belgium and of international law, Gustave Rolin-Jacquemyns, as its first secretary. This year Belgian hospitality, private and municipal, maintained its reputation for grace and generosity, a peculiar pleasure being added by the actual presidency of Baron Edouard Rolin-Jacquemyns and the honorary presidency of the oldest veteran of the army of international lawyers—Baron Albéric Rolin.

Prizes founded by Professor James Brown Scott in memory of his Mother, Jeannette Scott.

CARLOS CALVO PRIZE (1937)

THE Institute of International Law made no award of the Andrès Bello Prize (1935):

The subject for the competition for the Carlos Calvo prize to be awarded in 1937 is announced as follows:

> "On demande une étude documentée et critique sur les différentes causes de nullité d'une sentence arbitrale en droit international public et sur les conséquences d'une telle nullité."

The terms and conditions on which these prizes are awarded will be found in the *Annuaire de l'Institut de Droit International* for 1934, pp. 751 ff. Competitors must send in their work by March 1, 1937 at the latest to M. Charles De Visscher, Secretary-General of the Institute of International Law, 200 Avenue Longchamp, Brussels.

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

Advisory Opinion delivered April 6, 1935[1]

Minority Schools in Albania

This case was referred to the Court by the following Resolution of the Council of the League of Nations dated January 18, 1935:

"The Council of the League of Nations,

"In consideration of the Albanian Declaration made before the Council on October 2, 1921, Article 5 of which reads as follows:

"'Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular, they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein. .

"'Within six months from the date of the present Declaration, detailed information will be presented to the Council of the League of Nations with regard to the legal status of the religious communities, churches, convents, schools, voluntary establishments, and associations of racial, religious and linguistic minorities. The Albanian Government will take into consideration any advice it might receive from the League of Nations with regard to this question.'

"In consideration of the provisions of Articles 206–7 of the Albanian Constitution of 1933, which read as follows:

"'The instruction and education of Albanian subjects are reserved to the state and will be given in state schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed';

"In consideration of the plea adduced before the Council by the representative of the Albanian Government that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with Article 5, first paragraph, of the Albanian Declaration;

"In consideration of the report submitted to the Council on January 14, 1935, by the representative of Spain;

"Requests the Permanent Court of International Justice to express an advisory opinion on the following question:

"1. whether, regard being had to the above-mentioned Declaration of October 2, 1921, as a whole, the Albanian Government is justified in its plea that, as the abolition of the private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration;

"2. and if so, whether the Council of the League of Nations can, on the basis of the second paragraph of the said Article, formulate recommendations going beyond the provisions of the first paragraph."

---

[1] Series A/B, No. 64. The Court's publications can be obtained from the English agents: Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

Albania and Greece (which was the other country directly interested) submitted written statements to the Court and were represented by Counsel at oral hearings held in March 1935.

As pointed out in the Court's Opinion, the Declaration of Oetober 2, 1921, referred to in the Council's Resolution, was made by Albania, as a condition of its admission to the League, and was duly ratified. This Declaration belonged to the category of international acts designed for the protection of minorities, of which the treaty of 1919 between Poland and the Allied and Associated Powers was the prototype.

Albania, which became an independent state in 1913, has been subject to a number of different systems of government from time to time, but as appeared from the documents before the Court the Greek and other communities always in fact had their own schools. At the time when the Declaration of October 21, 1921, was being negotiated by the League, the Greek Government pressed for the inclusion of provisions guaranteeing that all Albanian subjects belonging to racial, religious, or linguistic minorities should be entitled to establish, administer, and control at their own expense charitable, religious, or scholastic institutions of all kinds, and the reply of the Albanian Government to this proposal indicated that it corresponded to the then existing position.

From 1924 onwards, however, the question of introducing a uniform system of state education and abolishing private schools began to be envisaged and various laws were drafted with this end in view. In 1928 a new Constitution was promulgated which preserved the existing position subject to certain conditions, but at last in 1933 the Albanian Constitution was amended to include the provisions set out in the Resolution produced at the beginning of this report.

Following upon the abolition of private schools, a number of petitions were addressed to the League by the minorities concerned, and in the course of their consideration in accordance with the usual procedure the legal questions now in issue arose for determination, and, as indicated above, were referred to the Court by the Council.

Upon the first question set out in the Council's Resolution the Albanian contention before the Court was that Article 5, paragraph 1, of the Declaration imposed no other obligation upon the Albanian Government, in educational matters, than to grant to its nationals belonging to racial, religious, or linguistic minorities a right equal to that possessed by other Albanian nationals. This conclusion was said to follow from the language of Article 5, paragraph 1, and to be in complete uniformity with the meaning and spirit of the minorities treaties, an essential characteristic of which is the full and complete equality of all nationals of the state, whether belonging to the majority or the minority. Any other interpretation would have the effect of creating a privilege in favour of the minority, and run counter to the essential idea of the law governing minorities. Moreover, as the minority régime is an extraordinary one, constituting a derogation from the ordinary law, the text in question should, in case of doubt, be construed in the manner most favourable to the sovereignty of the Albanian State.

The Greek contention was that the fundamental idea of Article 5 of the Declaration was, on the contrary, to guarantee freedom of education to the minorities by granting them the right to retain their existing schools and to establish others, if they desired; equality of treatment is merely an adjunct to

that right and cannot impede the purpose in view, which is to ensure full and effectual liberty in matters of education. Moreover, the application of the same régime to a majority and a minority, whose needs are so different, would only create an apparent equality, whereas the Albanian Declaration, consistently with ordinary minority law, was designed to ensure a genuine and effective equality, not merely a formal equality.

The Court dealt with these contentions as follows:

The Opinion states that the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language, or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties. The first is to ensure that nationals belonging to racial, religious, or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state. The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics. These two requirements are closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

In common with the other treaties for the protection of minorities, and in particular with the Polish Treaty of June 28, 1919, the text of which it follows, so far as concerns the question before the Court, very closely and almost literally, the Declaration of October 2, 1921, begins by laying down that no person shall be placed, in his relations with the Albanian authorities, in a position of inferiority by reason of his language, race, or religion. Thus, Article 2 stipulates for all inhabitants of Albania a certain minimum of rights, which are to be granted to them "without distinction of birth, nationality, language, race, or religion"; and Article 3 guarantees that Albanian nationality will not be refused to any person fulfilling the conditions mentioned in that article. Article 4 only relates to Albanian nationals and stipulates on their behalf equality before the law and the enjoyment of the same civil and political rights, without distinction as to race, language, or religion. It also defines certain of these rights, with the same object of preventing differences of race, language, or religion from becoming a ground of inferiority in law or an obstacle in fact to the exercise of the rights in question.

In all these cases the Declaration provides for a régime of legal equality for all the persons mentioned; in fact no standard of comparison was indicated, and none was necessary, for at the same time that it provides for equality of treatment the Declaration specifies the rights which are to be enjoyed equally by all.

After having regulated, as indicated above, the legal position of certain persons who, whether or not possessing Albanian nationality, come under Albanian sovereignty, and the legal position of Albanian nationals in general, the Declaration goes on to make special provision for Albanian nationals belonging to minorities of race, language, or religion. That is the subject dealt with in

paragraph 1 of Article 5, the provision which is expressly referred to in the first question put to the Court.

Paragraph 1 of Article 5 consists of two sentences, the second of which is linked to the first by the words *in particular*: for a right apprehension of the second part, it is therefore first necessary to determine the meaning and the scope of the first sentence.

This sentence is worded as follows:

"Albanian nationals who belong to racial, linguistic, or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals."

The question was what is meant by the *same treatment and security in law and in fact.*

It was to be noted to begin with that the equality of all Albanian nationals before the law had already been stipulated in the widest terms in Article 4. As it was difficult to admit that Article 5 set out to repeat in different words what had already been said in Article 4, one was led to the conclusion that "the same treatment and security in law and in fact" which is provided for in Article 5 is not the same notion as the equality before the law which is provided for in Article 4.

Moreover, as Article 4 stipulates equality before the law for all Albanian nationals, while Article 5 stipulates the "same treatment and security in law and in fact" for Albanian nationals belonging to racial, religious, or linguistic minorities as compared with other Albanian nationals, it was natural to conclude that the "same treatment and security in law and in fact" implies a notion of equality which is peculiar to the relations between the majority and minorities.

This special conception finds expression in the idea of an equality in fact which in Article 5 supplements equality in law. All Albanian nationals enjoy the equality in law stipulated in Article 4; on the other hand, the equality between members of the majority and of the minority must, according to the terms of Article 5, be an equality in law and in fact.

It was perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it could be said that the former notion excludes the idea of a merely formal equality.

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It was easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph 1 of Article 5. The equality between members of the majority and of the minority must be an effective, genuine equality.

The second sentence of this paragraph provides as follows:

"In particular they shall have an equal right to maintain, manage, and control at their own expense or to establish in the future, charitable, religious, and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."

This sentence of the paragraph being linked to the first by the words "in particular", it was natural to conclude that it envisages a particularly important illustration of the application of the principle of identical treatment in law and

in fact that is stipulated in the first sentence of the paragraph. For the institutions mentioned in the second sentence are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the state. Far from creating a privilege in favour of the minority, as the Albanian Government averred, this stipulation ensures that the majority shall not be given a privileged situation as compared with the minority.

Further, even disregarding the link between the two parts of paragraph 1 of Article 5, it seemed difficult to maintain that the adjective "equal", which qualifies the word "right", has the effect of empowering the state to abolish the right, and thus to render the clause in question illusory; for, if so, the stipulation which confers so important a right on the members of the minority would not only add nothing to what had already been provided in Article 4, but it would become a weapon by which the state could deprive the minority régime of a great part of its practical value.

If the object and effect of the second sentence of the paragraph is to ensure that Albanian nationals belonging to racial, linguistic, or religious minorities shall in fact enjoy the same treatment as other Albanian nationals, it is clear that the expression "equal right" must be construed on the assumption that the right stipulated must always be accorded to the members of the minority. The idea embodied in the expression "equal right" is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals. In other words, the members of the minority must always enjoy the right stipulated in the Declaration, and, in addition, any more extensive rights which the state may accord to other nationals. The right provided by the Declaration is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority; but if the members of the majority should be granted a right more extensive than that which is provided, the principle of equality of treatment would come into play and would require that the more extensive right should also be granted to the members of the minority.

The construction placed by the Court upon Article 5, paragraph 1, was, the Opinion states, confirmed by the history of this provision, which the Court proceeded to detail.

Having thus established that paragraph 1 of Article 5 of the Declaration, both according to its letter and its spirit, confers on Albanian nationals of racial, religious, or linguistic minorities the right that is stipulated in the second sentence of that paragraph, the Court found it unnecessary to examine the subsidiary argument adduced by the Albanian Government to the effect that the text in question should in case of doubt be interpreted in the sense that is most favourable to the sovereignty of the state.

The Court therefore answered the first question referred to it in the negative, and the second question did not arise.

The Opinion was given by a majority of 8 to 3, President Sir Cecil Hurst and Judges Count Rostworowski and Negulesco dissenting. They considered that

the words "equal right" in Article 5, paragraph 1, were clear and meant that there must be no discrimination as regards the maintenance and establishment of schools, &c.; it was not permissible to interpret Article 5 otherwise than in accordance with its plain meaning in order to give effect to what was presumed to be the general purpose of the minorities treaties.

Advisory Opinion delivered December 4, 1935[1]

Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City

The measures initiated by the German National-Socialist majority in the Danzig Senate have led to numerous difficulties between the Free City and the League of Nations, of which the present case is an instance. The matter in question here was the passing by the Senate of two decrees on August 29, 1935, relating, in the one case, to the criminal law and, in the other, to criminal procedure.

Article 2 of the Danzig Penal Code provided as follows:

"An act is only punishable if the penalty applicable to it has been prescribed by a law in force before the commission of the act."

By the new decree this was amended to read as follows:

"Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act."

The criminal procedure decree was as follows:

"(*a*) The following provisions shall be inserted in the Code of Criminal Procedure and shall constitute Article 170*a* and Article 267*a*.

Article 170*a*.—If an act which, according to sound popular feeling, is deserving of penalty is not made punishable by law, the Public Prosecutor shall consider whether the fundamental conception of any penal law covers the said act and whether it is possible to cause justice to prevail by the application of such law by analogy (Art. 2 of the Penal Code).

Article 267*a*.—If, in the course of the trial, it appears that the accused has committed an act which, according to sound popular feeling, is deserving of penalty but which is not made punishable by law, the court must satisfy itself that the fundamental conception of a penal law applies to the act and that it is possible to cause justice to prevail by the application of such law by analogy (Penal Code, Art. 2)."

These two decrees led to indignant protests on the part of the political parties other than the Nazis, and the High Commissioner brought the matter before the Council of the League, which on September 23, 1935, adopted the following Resolution:

"The Council of the League of Nations,

Having considered the communication from the High Commissioner of September 7, 1935, by which the High Commissioner transmitted to the Council:

(*a*) a petition dated September 4, 1935, and signed on behalf of the German-National members of the Danzig Popular Assembly, the Social-Democrat members of the Popular Assembly, and the Centre Party and the Centre Party members of the Popular

[1] Series A/B, No. 65.

Assembly, which protests against two legislative decrees of August 29, 1935, amending the Danzig Penal Code and the Danzig Code of Penal Procedure;

(*b*) the text of the said decrees;

(*c*) a communication dated September 7, 1935, from the Senate of the Free City of Danzig containing observations on the said petition,

Requests the Permanent Court of International Justice to give an advisory opinion on the question whether the said decrees are consistent with the Constitution of Danzig, or, on the contrary, violate any of the provisions or principles of that Constitution."

The Senate of the Free City submitted a written statement to the Court and was represented at oral proceedings held on October 30 and 31 and November 1, 1935.

The Court in its Opinion pointed out at the outset that the Constitution of the Free City is placed under the guarantee of the League and that a petition such as the one referred to in the Council's Resolution necessarily involves the League's guarantee. This sufficed to establish the international element in the problem submitted to the Court, and this element was not excluded by the fact that, in order to give the opinion for which it was asked, the Court would have to examine municipal legislation of the Free City, including its Constitution.

Turning to the decrees in question the Court observed that the original Danzig Penal Code gave expression to the maxims *Nullum crimen sine lege* and *Nulla poena sine lege*. The Agent for the Free City contended that, according to the new conception of penal law, real justice will take the place of formal justice and that thenceforth the rule will be *Nullum crimen sine poena* instead of *Nullum crimen sine lege* and *Nulla poena sine lege*. Detailed explanations were given regarding the advantages of the new penological idea over the old. With this the Court was not concerned. The sole question for it was whether the two decrees violate any of the provisions or principles of the Constitution.

Under the two decrees a person may be prosecuted and punished not only in virtue of an express provision of the law, as heretofore, but also in accordance with sound popular feeling.

Whatever may be the relation between the two elements—whether it be, as suggested by the wording of the first decree, that the act to be punished must in any case fall within the fundamental idea of the law and yet escape punishment unless condemned by sound popular feeling, or whether it be, as suggested by the wording of the second decree, that attention is first to be paid to the question of what is condemned by sound popular feeling but no proseeution is to be initiated or punishment imposed unless the act falls within the fundamental idea of some penal law—it is clear that the decision whether an act does or does not fall within the fundamental idea of a penal law, and also whether or not that act is condemned by sound popular feeling, is left to the individual judge or to the Public Prosecutor to determine. It is not a question of applying the text of the law itself—which presumably will be in terms equally clear both to the judge and to the person who is accused. It is a question of applying what the judge (or the Public Prosecutor) believes to be in accordance with the fundamental idea of the law, and what the judge (or the Public Prosecutor) believes to be condemned by sound popular feeling. A judge's belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the facts, so is his opinion as to what is condemned by sound popular feeling. Instead of applying a penal law

equally clear to both the judge and the party accused, as was the case under the criminal law previously in force at Danzig, there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.

Nor should it be overlooked that an individual opinion as to what was the intention which underlay a law, or an individual opinion as to what is condemned by sound popular feeling, will vary from man to man. Sound popular feeling is a very elusive standard. It was defined by the agent of the Free City as "une conviction correspondant aux strictes exigences de la morale". This definition covers the whole extra-legal field of what is right and what is wrong according to one's ethical code or religious sentiments. Hence it follows that sound popular feeling may mean different rules of conduct in the minds of those who are to act in accordance therewith. It is for this reason that legislation is necessary in order to lay down the precise limits between morality and law. An alleged test of sound popular feeling, even when coupled with the condition providing for the application of the fundamental idea of a penal law, could not afford to individuals any sufficient indication of the limits beyond which their acts are punishable.

Examining the provisions of the Danzig Constitution the Court observed that these embody the principle of the rule of law. On the one hand, all organs of the state are bound to keep within the confines of the Constitution and the law and, on the other, the private citizen is given certain fundamental rights, designed to protect him against the state.

The Danzig Constitution lays very special emphasis on the importance and the inviolability of the individual liberties which ensue from these fundamental rights. Article 71 lays down that "Fundamental rights and duties shall govern the direction and determine the scope of legislation, the administration of justice, and the conduct of public affairs". All the organs of the state dealt with in Part I of the Constitution are therefore required to guide themselves by these fundamental rights which, at the same time, set bounds to their activities.

The object of a large number of the articles of Part II of the Constitution is to confer essential individual rights. Thus Article 74 provides that the liberty of the person shall be inviolable; Article 75 gives freedom of movement within the Free City, the right to sojourn and to settle there, to acquire real property, to earn a living in any way; Article 79 confers upon individuals the right to express their opinion by word, in writing, or in any other manner; Articles 84 and 85 confer a right of assembly and association. Generally speaking, this Part II of the Constitution embraces practically all the aspects of the life of an individual in his public and private activities.

These provisions do not all confer absolute and unrestricted rights. The Constitution provides that, in the general interests of the community, some of the liberties of the individual may be restricted. But such restrictions can only be imposed by law. This is stated in a large number of the articles in Part II of the Constitution, and this is precisely the import of the guarantee afforded

to these liberties or fundamental rights. This appears more particularly in the three articles which have been mentioned and which refer to essential aspects of liberty: personal liberty, limitation or deprivation of which may not be imposed by public authority save in virtue of a law (Art. 74); the right of sojourn, settlement, and movement, a right which may not be curtailed without legal sanction (Art. 75); freedom to express opinion within the bounds of the law—no disadvantage of any kind may be imposed on a person "on account of his exercise of this right" (Art. 79).

The representatives of the Free City contended that the decrees of August 29, 1935, did not involve any violation of the Constitution of Danzig for the following reason. The decrees—they argued—had legal force under the law of June 24, 1933, in virtue of which they had been issued; the articles of the Constitution conferring liberties on individuals allow restrictions to be imposed by law; accordingly, the restrictions introduced by the decrees of August 29, 1935, were imposed in virtue of a law and therefore complied with the requirements of the Constitution.

The Court rejected this argument, observing that the word "law", in these articles of the Constitution, means not merely a legislative act, but also one the terms of which are in conformity with the Constitution and which, in particular, respects the principles on which the Constitution is based. Among the principles which the decrees are bound to respect is, as already pointed out, the principle which determines the position of the individual by according him certain fundamental rights. The rule that a law is required in order to restrict the liberties provided for in the Constitution therefore involves the consequence that the law itself must define the conditions in which such restrictions of liberties are imposed. If this were not so, i.e. if a law could simply give a judge power to deprive a person of his liberty, without defining the circumstances in which his liberty might be forfeited, it could render entirely nugatory a provision such as that contained in Article 74 of the Constitution. But, as already explained, the decrees of August 29, 1935, so far from supplying any such definition, empower a judge to deprive a person of his liberty even for an act not prohibited by the law, provided that he relies on the fundamental idea of a penal law and on sound popular feeling. These decrees therefore transfer to the judge an important function which, owing to its intrinsic character, the Constitution intended to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the state.

It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt that it exceeds these limits, and the present case was one.

For these reasons the Court held that the two decrees were not consistent with the Constitution and that they violated certain provisions and certain principles thereof.

Of the twelve judges composing the Court three dissented. Judge Count Rostorowski considered that the decrees were not in substance inconsistent with the Constitution, but that, having been issued by the Senate alone, they

were *ultra vires* as regards the form of their enactment. Judge Anzilotti was of opinion that the Court should not have given the opinion asked for because the question was one purely of Danzig constitutional law; international law did not come into it. Judge Nagaoka considered that the decrees themselves were not contrary to the Constitution, although a judgment rendered in application of them might be.

It may be added that the Free City desired to appoint a Judge *ad hoc* to sit in this case, and made application to the Court for this purpose. The application was refused on the ground that the question submitted to the Court for advisory opinion did not relate to an existing dispute between two or more states within the meaning of Article 71 of the Rules of Court.

ALEXANDER P. FACHIRI.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

Decisions of the English Courts during the Year 1935[1]

Case No. 1. International Trustee for Protection of Bondholders: Aktiengesellschaft v. *The King.*

In the 1934 number in this section of the *Year Book* (pp. 185–190) three English decisions[2] were discussed which dealt with the effect of contractual obligations to pay money in the existing conditions of the fluctuation of the relative value of the currencies of different countries. Two of these were decisions of the House of Lords. It was there suggested that these decisions showed (i) that these cases involved two distinct questions (*a*) what is the amount of the debt? and (*b*) in what manner is payment to be made? and (ii) that question (*a*) was one for determination by the application of the "proper law of the contract"[3] and (*b*) by the *lex loci solutionis*.

One of these two cases contained a decision by the House of Lords on the interpretation of a "gold dollar" clause in a contract, where the "proper law of the contract" and the *lex loci solutionis* were both English. The clause was held to be a clause for the payment in legal tender of the equivalent of the value of the contract number of gold dollars and not for payment in gold coins.

This year we have to deal with a decision of the King's Bench Division in a very important case on the effect of a "gold dollar" clause in bonds issued by the Government of the United Kingdom in the United States and payable in the latter country, and of the U.S. legislation of 1933 nullifying gold clauses on such a clause. The case raised the important question of the extent to which the *lex loci solutionis* may be held to effect not merely the legal tender in which the payment is to be made, but the amount of such legal tender necessary to constitute a performance of the obligation. Further comment is reserved till after a digest of the judgment.

International Trustee for Protection of Bondholders: Aktiengesellschaft v. *The King*, *52 T.L.R. 82.* (Branson J.)

In January 1917 certain banks and financial houses in the United States of America, acting on behalf of the Government of the United Kingdom, offered for subscription in the United States a loan of 250 million dollars by the issue of one year or two year gold notes, which were convertible at the option of the holder into 20 year 5½% bonds redeemable in February 1937. Some 143,567,000 dollars were so converted. The bonds were in dollar denominations of 1000, 500, and 100, and provided that the principal and interest "*will be paid at the option of the holder in New York* at an office which will be maintained there by the Obligor of the service of the bonds *in gold coin of the United States of America of the standard of weight and fineness existing on February 1, 1917, or in the City of London in sterling money at*

---

[1] In general all cases reported in the English Law Reports in 1935 and in contemporary reports covering the same period are reviewed in this number of the *Year Book* (unless they have already been dealt with in the previous number) together with any cases in the reports for 1936 which have appeared at the time of writing, February 1936.

[2] *Broken Hill Proprietary Company Ltd.* v. *Latham*, [1933] 1 Ch. 373.
Feist v. *Société Intercommunale Belge d'Électricité*, [1934] A.C. 161.
Adelaide Electric Supply Co. Ltd. v. *Prudential Assurance Co.*, [1934] A.C. 122.

[3] "The proper law of the contract is that legal system with which the contract has most real connection" (Cheshire, *Private International Law*, p. 146) or "with reference to which it must be deemed to have been made" (*l.c.*, p. 176).

the fixed rate of dollars 4.86½ to the pound" (i.e. the par rate between dollars and sterling).[1]

On June 5, 1933, the Congress of the United States passed "Joint Resolution No. 10" relating to gold clauses, and the Government of the United Kingdom took the view that they were henceforth legally entitled to discharge their obligations in respect of payment of the interest of this loan, when payment was made in New York, by paying a number of paper dollars, then legal tender in the United States, equal to the nominal number of dollars of the coupon, but they offered to holders of the bonds a conversion, the effect of which was to increase the capital sum eventually payable under the bonds though not increasing the interest, an offer of which the bulk of the holders availed themselves.

The suppliants in this case, a company incorporated in Lichtenstein, were the holders of a bond for 1,000 dollars which had not been converted. The claim was in respect of a coupon for interest of 27,500 dollars and the suppliants contended that the manner in which the Crown was ready to discharge this payment either in London or in New York was not in accordance with the contract contained in the bond.

The suppliants contended:

(i) that the clause in the bond about payment in gold coin did not mean that payment should be made in gold coins but that gold coin of the United States of the standard of February 1917 was used to fix the amount of the debt to be paid (i.e. the clause was a clause "*valeur or*" and not a clause "*espèce or*") and that consequently, when payment was demanded in New York of a coupon for 27,500 dollars, the obligation was to pay such a sum, in the money of account of the United States of America, as represented the gold value of 27,500 dollars, such gold value to be ascertained in accordance with the standard of weight and fineness of February 1, 1917; and

(ii) that where payment was demanded in London, the obligation was to pay such a sum in sterling as would be equivalent, at the fixed rate of 4.86½ dollars to the pound, to the sum payable in dollars in accordance with (i) above if payment had been required in New York:

(iii) that the Joint Resolution did not affect the Crown's obligations on the grounds, (*a*) that the contract was a contract governed by English law, and (*b*) that the Joint Resolution did not make it illegal to discharge the contract in the manner in which the suppliants contended it should be discharged, or

(iv) alternatively, if they were wrong as to the obligation under the contract, (i) above or as to (*b*) of (iii) above, the Joint Resolution would not apply to this contract because the Obligor was a foreign Sovereign.

It was contended on behalf of the Crown that,

(i) where payment was demanded in London, the terms of the contract were to pay a sum in sterling equivalent to the nominal amount of the coupon in dollars at the rate of exchange fixed in the contract;

(ii) as regards payments in New York:

(*a*) the law of the United States must be held to govern payments made in that country;

(*b*) the obligation under the bond was to pay in gold coin and, under the law of

[1] In 1917, though sterling was not technically on the gold standard, it did not stand in relation to the dollar at any great discount. Later on and until 1925 it stood at a considerable discount. From 1925 till 1931 both the dollar and the pound were on the gold standard and were more or less at complete parity in relation to each other. In 1931 the pound went off the gold standard and for two years stood at a discount in relation to the dollar, and in 1933 the dollar went off the gold standard, and has, since that date, often stood below the par rate of exchange in relation to the pound sterling.

the United States, it would be illegal to pay in gold coin and therefore the gold clause was void, or, alternatively, under the law of the United States (Joint Resolution No. 10) the Crown was entitled to discharge the obligation to pay in gold coin by paying an equivalent number of paper dollars which were legal tender, or,

(*c*) alternatively to (*b*), if the contract was to pay a number of dollars equivalent to the value of the nominal amount of gold dollars, under the law of the United States (Joint Resolution No. 10) it was illegal, or alternatively there was no obligation to do more than to pay a number of paper dollars equivalent to the nominal amount in gold dollars.

The effect of Joint Resolution No. 10 appears from its terms to be as follows:

(i) It applies to provisions in contracts which (*a*) purport to give a right to require payment in gold or a particular kind of coin or currency of the United States, or, (*b*) give a right to a payment of an amount in money of the United States measured in relation to gold coin of the United States.

(ii) Both clauses (*a*) and (*b*) are declared to be objectionable on the grounds that they obstruct the power of Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of Congress to maintain the equal power of every dollar, coined or issued by the United States, in the markets and in the payments of debts, and,

(iii) That for these reasons, the provisions of clauses (*a*) and (*b*) whether made before or after the date of the Resolution are declared to be against public policy, and obligations under them are to be discharged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts.

Held by Branson J.:

(1) If the contract had been one between two individuals, it would have been necessary to hold that the "proper law of the contract" was the law of the U.S., because the contract was made in the U.S., the money lent was dollars, payment was to be made in the U.S. (subject only to an alternative right of the holder to be paid in London), and the bonds, if registered at all, had to be registered in the U.S. Here, however, one of the parties was a Sovereign, a party who cannot be sued in any court unless he submits to the jurisdiction, and there is a strong presumption that a Sovereign will only submit to the jurisdiction of the courts of his own country (i.e. in the present case to the English courts).

Consequently the position was very much as if there had been inserted in the contract an express clause that the English courts should determine all the disputes arising thereunder. Clauses of this kind when inserted have generally been held to mean that English law is also the proper law of the contract. *Therefore, English law must be held to be the proper law of the contract and to apply to the interpretation of the meaning of its provisions.*

(2) (*a*) The next question was whether the reference in the bond to payment "in gold coin of the U.S. . . ." should be regarded as (i) fixing the mode of payment of the sums named in the bonds; or, (ii) the amount of the debt created by the bond:

(*b*) The literal meaning of the words used indicated meaning (i) and there was no ground for holding that the words had any other meaning because in the U.S., in 1917, when the contract was made, it was perfectly possible to pay in gold coin of the U.S., except sums under $2\frac{1}{2}$ dollars, and, when legal tender had to be made, it was obligatory to pay such gold coin, and the practice was to regard these gold clauses as meaning exactly what they said, namely, as creating an obligation to pay in gold coin.

(*c*) The view expressed in (*b*) above was not different from that adopted by the Supreme Court of the United States in its decisions of February 1933, in *Norman* v.

Baltimore and Ohio Railway[1] and in *Perry* v. *U.S.*[2] In *Norman's* case the U.S. Supreme Court treated the question whether the gold clause was one fixing the mode of payment or the amount of the debt as being immaterial to the question which it had to decide (the "constitutionality" of the Joint Resolution No. 10) because the Resolution affected both sorts of clauses equally: in *Perry's* case the Court must have held that the gold clause related to the mode of payment because otherwise it could not have reached the conclusion that the Plaintiff had suffered no damage because he had received x paper dollars instead of x gold dollar coins. It may be possible to contend that x paper dollars are equal in purchasing value to x gold dollar coins, but it is not possible to argue that x paper dollars are equal in purchasing value to x plus y paper dollars, which is what the Plaintiff would have got if the gold clause had been enforced. Even if these decisions of the U.S. Supreme Court had regarded the gold clauses as relating to the amount of the debt, these decisions being given in 1935 were not relevant in order to determine the interpretation of a contract which was made in 1917, and governed by English law.

(*d*) Paragraph (*b*) above was not inconsistent with the decision of the House of Lords in the *Feist*[3] case, although the House of Lords held that the gold clause there determined the amount of the debt and not the mode of payment because (i) the language of the contracts, and (ii) the surrounding circumstances in *Feist's* case were different from those of the present case. As regards (i), here the reference to "gold coin" came in a paragraph relating to places and media of payment which was separated from that in which the amount of the debt was described. In *Feist's* case this was not so, and there was a provision that the bond was "one of an issue of £500,000 in sterling in gold coins of the U.S." to which there was no counterpart in the bond in this case. As regards (ii), gold coin was not in circulation in the U.K. when the contract in *Feist's* case was made—that contract requiring payment in the U.K.—whereas here the contract required payment in gold coin in the U.S. and at the time the contract was concluded it was in circulation there.

(*e*) *For these reasons the gold clause in the present case must be interpreted as* (i) *fixing the mode of payment and not the amount of the debt, and* (ii) *actually requiring payment in gold coin.*

(3) (Upon evidence of U.S. law)

(*a*) By reason of the Joint Resolution No. 10 of June 5, 1933, it had become not merely impossible, but also illegal, to discharge an obligation in the United States in gold coin as the bond required.[4]

(*b*) It was not possible to consider that this Joint Resolution did not apply to payment by foreigners or foreign Sovereigns because the reasons of policy upon which it was based would be defeated if such exceptions were allowed; and though, under international law, legal action could not be taken in the courts against a foreign Sovereign which infringed the Resolution, this did not mean that the foreign Sovereign had immunity from the operation of the law in respect of his acts within the jurisdiction, but merely that he had immunity from legal process.

(*c*) The provision of a contract, even if English law is the proper law of the contract, which requires something to be done in a foreign country which is illegal by the law of that country is void.

(*d*) For these reasons the provision of this bond requiring payment *in New York in gold coin was void.*

(4) Even if the conclusion arrived at in (2) above as to the meaning of the gold clause was wrong and consequently the number of dollars to be paid in the United States might vary in accordance with the relation of the dollar, which was legal tender at any time, to the gold dollar of February 1917, the provision of the bond as

[1] 55 S.C. 407. [2] 55 S.C. 432. [3] [1934] A.C. 161.
[4] Query whether this did not rather result from some other U.S. legislation.

regards payment in London at a fixed rate must mean payment of such a sum in sterling as would equal the nominal value of the coupon in dollars at the fixed rate. The contention of the suppliants as to the meaning of the provision for payment in London, produced the absurd result that, if the dollar depreciated, and sterling remained at its par *gold* value the Crown would have to pay more in sterling because the dollar had depreciated.

The following comments may be made upon this judgment:

There seems to be no reason to doubt the soundness of conclusion No. 1 (the proper law of the contract was English. In the *Serbian Loans* case (Series A. No. 20), the Permanent Court of International Justice held for similar reasons (p. 42) that Serbian law was the proper law of the contract). Conclusion No. 3 (that the clause was void because it was illegal to perform it in the United States) depends upon conclusion (2) (that the clause required payment in gold coin): otherwise it is amply supported by authority.

As regards point (*c*) in (3), it may be interesting to compare this statement of Branson J. with the following passage of the judgment of the Permanent Court of International Justice in the *Serbian Loans* case, p. 41,

> "It may happen that the proper law of the contract is in some country overridden by a legal provision of the latter of an imperative character founded on public policy, and apart from rules of public policy, it is possible that the same law may not govern all aspects of the obligation. The distinction which seems to be indicated for the purpose of this case is more particularly that between substance of the debt and certain methods for the payment thereof."

The part of the judgment which is perhaps more open to doubt is conclusion (2) (that the clause was one creating an obligation to pay in gold coin and not merely the value of gold in whatever might be legal tender). It is not, however, without interest to note that the Court of Appeal at The Hague on January 15, 1935, in the case of the *Amsterdam Stock Exchange* v. *the Bataafshe Petroleum Maatchappy* so interpreted a somewhat similar clause.

The argument for distinguishing the bond in this case from that in the *Feist* case, see (2) (*d*) above, certainly has a considerable force. In the *Serbian Loans* case the Permanent Court held that the gold clauses in the bonds there under consideration were clauses for payment of the value of gold and not for payment in gold coins. The wording of these clauses referred to "repayment at their nominal value in gold . . . at the rate of 500 francs in gold for each bond of 500 francs nominal etc." The Permanent Court said (p. 32) "the treatment of the gold clause as indicating a mere method of payment, without reference to a gold standard of value, would not be to construe it but to destroy it". Perhaps, however, a distinction may be drawn in the present case because in the bond under consideration by Branson J. the actual value of the gold coin mentioned is fixed, (viz. the gold dollar in use in February 1917) whereas, if the Serbian bonds had been interpreted as payable in gold coin the effect might have been very little at all. There is no reference in the Serbian bond to gold coin of any particular date and fineness, and a gold piece of 25 francs might have been retained in currency although the franc had been depreciating, by making the gold coin half its previous size.

The view expressed in (2) (*c*) above, that the U.S. Supreme Court had also interpreted the gold clauses as creating obligations to pay in gold coin, is interesting, especially as it is not the view usually taken of these decisions. Branson J.'s view, however, that the decision of the Supreme Court in *Perry's* case with regard to damages can only be justified if the clause is interpreted for one of payment in gold coin, is cogent. On the other hand, it must be admitted that, taking the two judgments as a whole, there are many passages which seem to point to the opposite view, and on the question of *valeur or* or *espèce or* there is much to be said for the view that all these gold dollar clauses,

which all have the same origin, should be interpreted in the same way—even if their language occasionally differs on points of detail—since there is little doubt that they were all intended to mean the same thing. In spite of the difference of language of the clauses under consideration much of the reasoning of the House of Lords in *Feist's* case in favour of *valeur or* does apply here.

Having taken the view he did on the interpretation of the clause, Branson J. did not have to deal with the contentions of the Crown based on the assumption that the clause was one for payment, in whatever might be legal tender at the time, of the value of the gold dollar of February 1917. The contention of the Crown on this point was that the Joint Resolution No. 10 either (*a*) made it illegal for the Crown to pay in the United States more than the amount of paper dollars equal to the nominal amount of the coupons, or (*b*) entitled the Crown to discharge its obligation by making this payment.

As regards the first of these two alternatives, though the point is not dealt with in the judgment, it seems probable that the evidence on U.S. law would not have supported the Crown's argument. Indeed, it is difficult to see how the Resolution could make it illegal for a debtor voluntarily to pay more than he had to pay. On the other hand, there is no doubt that, as a matter of U.S. law, the Resolution supported the Crown's argument (*b*), provided the Resolution applied to this contract. There are reasons for thinking that, as a matter of United States law, the Resolution must be taken to apply to all contracts payable in the United States, whatever the nationality of the debtor or creditor or whatever the proper law of the contract.[1]

Assuming, therefore, that as *a matter of United States law* the Resolution would be applied to this contract in order to entitle the Crown to discharge its debts by paying dollar for dollar in paper, would an English Court, applying the English rules of private international law, hold United States law to be applicable in this respect in view of the fact that English law is the "proper law of the contract"? Does a provision of United States law apply which entitles a debtor to a discharge if he makes payment of a certain amount, not the amount stipulated in the contract, without making the payment of the amount stipulated in the contract either illegal or impossible? Some of the cases cited in the judgment of Branson J., if taken alone, might indicate that the *lex loci solutionis* does not apply to this extent in a contract whose proper law is some other law. However, there is strong support for the contrary view in the judgment of the House of Lords in the *Adelaide Electric Supply Company* case.[2] In the *Adelaide* case the proper law of the contract was English (see p. 137 *per* Lord Warrington, p. 145 *per* Lord Tomlin). Payment, however, had to be made in Australia. The contract was to pay in pounds, and the question was whether payment of the stipulated number of pounds in Australian legal tender, which had a lower value than English legal tender, was a valid discharge. There was considerable difference of opinion both in the House of Lords (and in the courts below in the *Broken Hill* case) as to whether there was at the relevant time a legal distinction between an Australian and an English pound or whether there was merely a difference of what notes or coins were legal tender in the two countries. But as far as one can see, all the Law Lords, whatever view they took upon this point, applied the law of the place of payment in order to determine what sort of payment was a fulfilment of the obligation.

---

[1] A recent decision of the Court of Appeals of New York "*Compania do Inversiones* v. *Industrial Mortgage Bank of Finland*" (November 9) holds the Resolution to apply to bonds issued and payable in the United States, in a case where both the Plaintiff and Defendant were foreigners resident outside the United States. It is true that the Court also held that the "proper law of the contract" was United States law, but it goes on to say that it would have come to the same decision even if it had held that the "proper law of the contract" was some other law. It is true that neither party here was a foreign Sovereign, but the reasoning of Branson J. in (3) (*b*) above seems to show that the fact that a party is a foreign Sovereign makes no difference.

[2] [1934] A.C. 122.

Thus on p. 139 Lord Warrington says, "monetary obligations are effectively discharged by payment of that which is legal tender in the *lex solutionis*". Lord Tomlin on p. 145 says, "where in an English contract governed *prima facie* by English law, there is a provision for performance in part in another country, the *prima facie* presumption is that that performance is to be in accordance with the local law". Lord Wright, p. 151, "It is established *prima facie*, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation in a particular country other than the country of the proper law of the contract."

In the *Brazilian Loans* case (p. 122) the Permanent Court of International Justice said, "The situation need only be envisaged if . . . French law rendered it impossible to *claim* payment otherwise than in bank notes which are compulsory tender and for the same amount of francs as are specified in the contract."

It may be recalled that in these cases the proper law of the contract was Serbian or Brazilian, as the case may be, but payment had to be made *inter alia* in France. The Serbian and Brazilian Governments contended that French law governed the manner in which payment must be made in France, and that under French law, in spite of the gold clause, the debtor was entitled to pay, in whatever francs might be legal tender at the moment, franc for franc, of the nominal value of the bonds and coupons. The Serbian and Brazilian Governments lost their cases because the Permanent Court found that French law was not what it was contended to be (that French law only nullified the gold clause in domestic and not in so-called international contracts). It is interesting to speculate to what extent the passage quoted above shows what the view of the Permanent Court would have been if they had found that French law was in accordance with the Serbian and Brazilian contention. There was not, of course, any question of French law making it illegal for the debtor to pay more than he was obliged to if he wanted to do so. The only question was what was the minimum that he must pay to discharge his legal obligation. The Permanent Court says,

> "The application of the laws of the place of payment which have to govern the currency in which the payment must be made involves no difficulty so long as that law does not affect the substance of the debt to be paid and does not conflict with the law governing that debt."

But what is the position if the law of the place of payment *does* affect the substance of the debt? Does it nevertheless apply? It is impossible to suggest that the Permanent Court expressed the view that even in this case the law of the place of payment would not prevail, but it is perhaps equally impossible to argue that the Permanent Court held that it would. There is no doubt that Judge Bustamente in his dissenting judgment makes the law of the place of payment prevail, even in such a case.[1]

Case No. 2. Maritime Assurance Company v. *The Assecuranz-Union von 1865.* 52 Ll. l. Rep. 16.

The question in Case No. 2 was whether the "proper law of the contract"[2] was English or German. The contract was one for reinsurance between a United Kingdom company and a German company, being signed by the United Kingdom company in London and finally executed by the German company in Germany. The contract contained a clause for the settlement of any dispute by arbitration in London, the Chairman of the London Institute of Underwriters having powers to nominate the umpire. If the proper law was German the contract was valid and enforceable; if it was English the contract was unenforceable because no policy complying with the provisions of the United Kingdom Stamp Act 1891 (an enactment for the protection of the revenue) had been issued. It was held that the arbitration clause showed that the proper law of the contract was English law.

[1] *L.c.*, p. 54.

[2] See footnote 3, p. 205.

Case No. 3. Grein v. *Imperial Airways Limited.*

Case No. 3 is of interest as a decision—the first reported English decision—on the "general conditions for the carriage of passengers and goods by air"[1] and on the interpretation of the general international convention, opened for signature at Warsaw on October 21, 1929, for the "Unification of certain rules relating to International Carriage by Air". The convention is scheduled to the Carriage by Air Act 1932 which makes it part of the law of the United Kingdom. The convention only applies to "international carriage", an expression which is defined in its first article, and this decision was to the effect that the convention did not apply to the case as the facts did not bring the carriage within the definition.

Grein v. *Imperial Airways.* 52 T.L.R. 28. (Lewis J.)

Grein, a dealer in skins of a foreign nationality, of sixty-two years of age and domiciled in a foreign country, was killed when travelling as a passenger in the defendants' aeroplane which was wrecked as the result of a collision with the masts of a wireless telegraph station in Belgium. Grein was travelling on a return ticket purchased in London for the journey to Brussels and back. The accident took place on the return journey. Separate tickets were issued for the two journeys. The plaintiff was the widow, aged fifty-five, of Grein.

The Plaintiff (1) alleging that the accident was due to the negligence of the pilot, a servant of the defendants, claimed damages for herself and her daughter, aged twenty-seven, under the Fatal Accidents Act 1846, an Act which entitles the personal representatives of a deceased person, whose death has been caused by negligence or other wrongful act, to sue the party responsible for such act for damages in compensation for the injury resulting from the death to the wife, child and other near relations of the deceased, and, if there is no personal representative or if he does not sue, entitling any of the said relations to bring the action in his own name:

alternatively, (2) claimed damages on the basis of contract alleging that under Articles 18 (2) and 19 (1) (i) of the "general conditions of carriage of passengers and baggage" which formed part of the contract of carriage, the defendants had agreed to be liable *inter alia* for damage sustained in the event of an accident occurring on board the plane causing the death of a passenger.

The defendants contended (1) that, as Grein was travelling on a return ticket from London to Brussels and back, the carriage must be regarded as a single journey with London as place of departure and destination with an agreed stopping place at Brussels: the United Kingdom was a territory of a High Contracting Party to the convention of October 1929 for the "Unification of certain rules relating to International Carriage by Air" and, although Belgium was not a party, the carriage was an "international carriage" within the second half of the definition in Article 1 (2) of that convention (i.e. the places of departure and destination were both in the territory of the same High Contracting Party with an agreed stopping place in the territory of another Power, whether a party to the convention or not);

(2) that the Carriage by Air Act 1932 (to which the provisions of the said convention were scheduled) had given the Articles of the convention the force of law in the United Kingdom in relation to any carriage to which the convention applied;

(3) that under Article 20 (1) of the convention (which was to the same effect as Article 19 (1) (iii) of the "general conditions") the liability of the carrier under Article 17 (reproduced in Articles 18 (2) and 19 (1) (i) (*a*) of the "general conditions") for death or injury to a passenger was discharged if the carrier proved that he and

[1] Conditions applicable to all carriage (internal and international) performed by a member of the International Air Traffic Association except where the contrary is stated.

his agents had taken all possible steps to avoid the accident or that there were no steps he could have taken;

(4) that the defendants and their servants and agents had taken all possible steps;

(5) that alternatively if the defendants were liable for damages at all, their liability was limited by Article 22 (1) of the convention (reproduced in Article 19 (2) (i) of the "general conditions") to 125,000 francs for each passenger;

(6) that by section 1 (4) of the Carriage by Air Act the liability of the carrier in respect of the death of a passenger under the articles of the convention, which could be enforced by the persons set out in the second schedule of the Act (in effect the same persons as could claim under the Fatal Accidents Act 1846), was declared to be in substitution for any other liability by statute or at common law and therefore took the place of the action under the Fatal Accidents Act;

(7) alternatively, if the carriage was not an "international carriage", that the liability of the defendants was governed by the "general conditions", and under Article 18 (5) of these conditions the passenger renounced for himself and for his personal representative all claims for compensation in connexion with the contract of carriage for damage to the passenger or other persons who might (otherwise) claim, other than claims for damage expressly provided for in the said conditions;

(8) that Article 19 (1) (iii) of the said conditions qualified their liability under Articles 18 (2) and 19 (1) (*a*) and in the circumstances there was no liability (see (3) and (4) above);

(9) alternatively that Article 19 (2) (i) of the general conditions limited their liability (see (5) above);

alternatively if they were not entitled to rely on the general conditions in reply to a claim under the Fatal Accidents Acts:

(10) that there had been no negligence on the part of the defendants, their servants or agents;

(11) that the plaintiff and her daughter, not being domiciled in the United Kingdom, were not entitled to bring a claim under the Fatal Accidents Act 1846.

Held, (*a*) that the carriage was not an "international carriage" within the definition contained in the convention as contended by the defendants in (1) above: it was not correct to regard the carriage as one to and from London with Brussels as an agreed stopping place: there were two separate carriages, London to Brussels and Brussels to London, notwithstanding that a return ticket was taken. Any other view would produce the anomalous results that, although under a return ticket issued in London a journey to Brussels and back would be "international carriage", it would not be an "international carriage" if the defendants issued a ticket in Brussels for a return journey to London and back or if they issued one for a single journey from London to Brussels;

(*b*) that therefore the defendants' contentions under (2), (3), (5), and (6) above did not apply, though if the carriage had been an "international carriage" they would have been well founded;

(*c*) that as regards the contention of the defendants on the "general conditions" (Nos. 7 and 8) the conditions did not exclude liability unless the defendants proved that all possible steps had been taken by them and their servants to avoid the accident, and therefore did not exclude it if one of their servants was guilty of negligence causing the accident, and on the facts he found that, though the defendants were free from blame in every other respect, the pilot was negligent in not turning back when he failed in the fog to get a wireless message from the Brussels aerodrome;

(*d*) (with reference to the defendants' contention No. 9) that, in the case of limitations of liability in conditions on railway tickets, it had already been decided that such an agreement by the deceased limiting his claims did not limit the claims of members of his family under the Fatal Accidents Act, and the present case was analogous;

(*e*) (with reference to the defendants' contention No. 10) that there was negligence by the pilot (see (*c*) above), and with reference to contention No. 11, that this had been previously decided in a contrary sense by a decision binding on any court of first instance in the United Kingdom.

(*f*) that the defendants should pay £3,500 to the plaintiff for herself and £500 for the deceased's daughter.

Case No. 4. Robey v. *Vladinier*: 52 T.L.R. 22. Div. Ct.

Case No. 4 deals with a point connected with the exercise of criminal jurisdiction over foreigners[1] in connexion with crimes committed on ships on the high seas or in foreign ports. In the present case a Jugoslav national had concealed himself as a stowaway on a British merchant vessel when she was in a French port, and disclosed himself the following day when the vessel was on the high seas and was then brought by the vessel to London where a prosecution was instituted against him before a London magistrate. The magistrate held that he had no jurisdiction to try the accused because the latter was a foreigner and the alleged offence had been committed in a French port. On appeal a Divisional Court of the King's Bench Division reversed this decision.

It was held (i) that the effect of section 684 of the Merchant Shipping Act 1894 was merely to give the magistrate jurisdiction to try this man, if the offence was one which fell within the jurisdiction of the English courts at all;

(ii) that section 686 gave the English courts jurisdiction to try (i) any offence committed by a British subject (*a*) on board any British ship whether on the high seas or in a foreign port, or (*b*) on board a foreign ship to which he does not belong, (ii) any offence committed by a foreigner on board a British ship on the high seas; and consequently it was necessary to show that this man had committed an offence on the high seas if there was to be the jurisdiction to try him;

(iii) that the offence of "stowing away" was defined by section 237 in such a manner as to show it was composed of two elements (*a*) "secreting oneself", and (*b*) "going to sea" without the consent of the persons in charge of the ship, and that in this case the offence was completed and committed when the ship reached the high seas carrying the accused present on the ship without the consent of her officers.

Case No. 5. In re Wilks: [1935] Ch. 643.

Case No. 5 raises an interesting question of classification ("qualification"). According to English rules of private international law, the "Administration" of the estate of a deceased person is governed by the law of the country where the assets are situated, and "succession" is governed by the law of the domicil of the deceased. The question was whether a certain matter must be considered to be succession or administration. A man died domiciled in Ontario, Canada, leaving property (*inter alia*) in England, in respect of which he was intestate. The persons entitled to succeed under the law of the domicil were a widow and some infant children. The assets in England included a large number of shares in an English private company, and the question was whether the English personal representatives were obliged to sell at once that portion of the shares which would descend to the children or whether they had a discretionary power to postpone the sale. Under the law of Ontario there was no such power but, if English law applied, the administrators had, under the provisions of section 33 of the Administration of Estates Act 1925, the power, if they thought it in the interests of the beneficiaries, to postpone the sale as long as they thought fit. The question, therefore, was whether this power fell into the sphere of administration or of succession. On the one hand it was contended that, when debts and duties had been paid and the net residue ascertained, administration was at an end or any rate the net residue should be remitted to the principal administrator in the country of the

[1] On general question see articles in the *B.Y.B.* 1925, p. 44, and 1927, p. 108.

domicil, seeing that the other administrations were regarded as only ancillary. On the other hand, it was contended that administration continued until such time as the administrator could obtain a receipt for the shares from the beneficiaries, and consequently in the case of infants it continued during minority. It was held by Farwell J. that this matter fell into the sphere of administration and it would appear that this was the view for which all parties before the court contended. The argument relied upon by the learned judge in support of his view was that section 33 of the Administration of Estates Act, the section which gives power to postpone sale, is placed in part 3 of the Act under the heading "Administration of Estates", and not in the fourth part of the Act which is headed "Distribution of Residuary Estate", and therefore the legislature must be deemed to have intended that this particular matter must be regarded as falling within the sphere of administration.

The arrangement of provisions in an Act of Parliament and the intention of the legislature to be presumed therefrom is probably a very unreliable guide on a question of classification for the purposes of the application of a private international law rule. It is highly unlikely that the Act was drafted with private international law considerations in mind. Foreign courts have often been obliged to hold that portions of their Code of Procedure must be classified as substantive law and vice versa for the purposes of the application of private international law rules. It seems, moreover, possible that "administration", in the two private international law rules in question, has a narrower meaning than the term "administration" in general because the administration in a country, which is not that of the domicil, is ancillary to the latter and should involve no more than is necessary for the handing over of the property or its proceeds to the administrator of the domicil with debts and duties paid.

Case No. 6. de Becche v. *The South American Stores Ltd.*, [1935] A.C. 149.

The House of Lords decision in *de Beeche* v. *the South American Stores Limited* was given in a case the decision of first instance in which has already been referred to in a footnote in a previous number of the *Year Book* (*B.Y.B.* 1934, p. 191). The main issues in the case are not of general interest, but there are useful observations by the House of Lords upon (1) the admission of evidence of a local foreign custom when it is alleged that words in a contract have a special customary meaning, and (2) the manner in which an English court should decide questions of foreign law.

The claim was for a large sum of money in sterling by way of rent for buildings in Chile leased to the respondents, English companies, by the appellant, a Chilean national resident in France. According to the terms of the leases the rent was to be payable monthly in advance "in Santiago by first-class bills on London". The rent was duly paid until November 1931. In July 1931 (followed by a second law in April 1932) a Chilean law was passed under which the control of all operations in foreign exchange in Chile was entrusted to a Government Committee, and the respondents contended that, by reason of the provisions of this law, it had become impossible for them to fulfil the terms of the contract with regard to the payment of rent unless they obtained the permission of the said Committee to obtain the bills on London, and that this permission had always been refused. The question whether this contention was well founded turned upon (*a*) the exact meaning of the words of the contract "first-class bills on London" and (*b*) the exact effect of the Chilean exchange legislation.

As regards (*a*) the respondents contended that these words had acquired a special meaning under a commercial custom in Chile, and offered evidence to the effect that they meant bills drawn by one of a certain selected group of commercial houses in Chile upon one of a certain group of financial houses in London. The Lord Chancellor held that the evidence of the customary meaning was admissible because (1) it did not conflict with any statutory definition of any term, (2) it was of a usage common to the place in question, and (3) it was of a nature to explain and not to contradict the terms in the contract.

As regards (*b*), English courts, having no judicial cognizance of foreign law, it has to be proved by evidence like any question of fact. Here both sides offered the evidence of persons claiming to be Chilean lawyers as to the meaning and effect of the Chilean legislation (such evidence being the primary and essential method of proving foreign law before an English court). This testimony was conflicting. Agreed translations of the relevant Chilean decrees were placed before the court, and the Lord Chancellor said that it was the duty of the English court to construe the provisions in the translation as well as it could in order to decide between the conflicting views of the Chilean experts. Moreover, the English court had evidence as to the manner in which the Chilean Government Committee was in fact interpreting the law, and the Lord Chancellor said that the English court in forming its own view must pay regard to the manner in which a foreign governmental authority interpreted its own laws, a statement which is in harmony with the view taken by the Permanent Court of International Justice, as to its own duty when it has to pronounce on a question of municipal law. The Permanent Court has said that, if it has to ascertain what French law is on a given point, it must answer the question on the basis of the manner in which French law is in fact applied in France by the French courts and not merely on the basis of the interpretation which the Court itself might be disposed to put on Articles in the French Code or laws.[1]

[1] See the *Publications of the P.C.I.J., Series A*, Nos. 20–21 (Cases of the Serbian and Brazilian Loans), pp. 46 and 124; and *B.Y.B.* 1930, pp. 19–20.

REVIEWS OF BOOKS

Académic de Droit International: Recueil des cours, 1934. Vols. 47–50 of the series. Paris: Sirey.

The *Recueil* for 1934 contains twenty-six courses of lectures, 3,424 pages, and the following is a very summary account of the contents.

In Volume I M. Yepes (*Droit des gens en Amérique*) discusses some fundamental problems in which he finds a distinctive "American" attitude towards the law. The discussion is temperate in tone, but most of the views expounded are "Latin-American" rather than "American", and, like other writers on the theme of continentalism, M. Yepes does not mention Canada. M. Szászy (*Conflits de lois dans le temps*) contributes a highly theoretical study which will, it is to be feared, bewilder most English readers; it is noticeable that a three-page bibliography contains no English reference. M. Strupp (*Règles générales du droit de la paix*) gives a clear and consistent exposition of his well-known positivist position. M. Mandelstam (*Politique russe d'accès à la Méditerranée au XX^e siècle*) writes on an episode in diplomatic history in which he has been one of the actors.

In Volume II M. Wehberg (*Police Internationale*) examines such experience as we have of the use of international forces and numerous suggestions that have been made for their extended use. He ends on a cautious note with the conclusion that the matter cannot be treated in isolation; it is bound up with wider questions of the development of the League. M. Gidel (*Mer territoriale et zone contiguë*), speaking of the attempt to codify this subject in 1930, says that the danger of all such attempts is that "s'ils ne parviennent pas à transformer en règle écrite la coutume dont ils ont en vue la cristallisation, ils ruinent ce qu'ils proposaient de rendre indestructible". He thinks that the international validity of the contiguous zone must be accepted. M. Fernand De Visscher (*Conflits de lois en matière de droit aérien*), after stating some of the problems, advises a cautious development of the law in view of the rapidity with which the technical data are liable to be changed. M. Sibert (*Organisation et technique des conférences internationales*) finds that in four respects progress has recently been marked; these are better preparation, the weakening of the rule of unanimity, more frequent arrangements for periodical meetings, and an increased use of technical experts. Professor Stuart, of Stanford (*Droit et pratique diplomatiques et consulaires*), gives a clear and succinct account of his subject. M. Truchy (*L'union douanière européenne*) has no illusions about the present practicability of the ideal; it is, however, *une idée-force*. M. Ray, under a rather cryptic title (*Conflits entre principes abstraits et stipulations conventionnelles*), discusses from the point of view of theory, the problem of "unequal" treaties, that is to say, of treaties which impose a special legal régime on one only of the contracting parties. The contemporary interest of this subject is only too clear. Dr. Lauterpacht (*Travaux préparatoires et l'interprétation des traités*) shows convincingly both that international law admits this method of proof and that the objections to the practice are outweighed by its advantages.

In Volume III M. Giraud (*Théorie de la légitime défense*), while refraining from formulating a thesis of his own, attempts to set out the existing law on the

subject, which he admits to be uncertain. An effective law of self-defence presupposes, he thinks, an organized and developed international society, affording some means other than the force of an aggrieved state of securing respect for rights and safeguarding legitimate interests. M. Bourquin (*Sécurité internationale*) also emphasizes the unescapable connexion of this problem with the problem of devising substitutes for resort to force, and from that passes to a discussion of the means which are available (*a*) for the repression, and (*b*) for the prevention, of violations of security. Mr. Whitton (*La règle Pacta sunt servanda*) reviews in detail the doctrinal foundations of the rule, and suggests the qualifications of the rule and the changes in international organization which are necessary to make it effective in practice. M. Habicht, in an article which has since been published in English by the New Commonwealth Institute (*Pouvoir du juge international de statuer ex aequo et bono*) examines the provisions of existing treaties which admit a procedure of this kind. Mr. Bentwich deals critically with *Le développement récent du domicile en droit anglais*. M. Meijers in a learned article on *L'histoire des principes fondamentaux du droit international privé* emphasizes the force of tradition in the development of this branch of law. M. Griziotti writes on *L'évolution monétaire depuis la guerre*.

In Volume IV M. de Brouckère (*Prévention de la guerre*) rightly points out that it is more urgent to secure that the existing machinery is used than to consider how it can be perfected. M. Reale (*Problèmes des passeports*) shows the stupidity of the passport system for the purposes it is supposed to serve and the unnecessary suffering that it involves. Mr. Beckett (*Jurisprudence de la Cour Permanente*) supplements his earlier study of the Court published in the *Recueil* of 1932 by an examination of the decisions from July 1932 to July 1934. M. Kraus (*Système et fonctions des traités*) attempts a classification of treaties both from the formal and the material points of view. A reference to the important contribution which Professor McNair made to this subject in the *Year Book* for 1930 would have been in point. M. Raape (*Rapports juridiques entre parents et enfants*) deals with some difficult problems of a branch of private international law on most of which English authority or discussion is rather scanty. M. Gardot (*Jean Bodin; sa place parmi les fondateurs du droit international*), for many years a devoted student and popularizer of Bodin's thought, sees in him not merely a precursor, but a founder, of international law. M. Veija Simöes (*Crise et intervention*) is very critical of the "myths" of the classical economists on this subject.

J. L. B.

Tratado de Direito Internacional Publico. By Hildebrando Accioly. Vol. III. Rio de Janeiro, 1935. 530 pp.

This is the third and concluding volume of an institutional treatise on public international law by a Brazilian jurist. It deals with the law of international disputes, war, and neutrality, and like the earlier volumes is full of interest to others besides the public for whom it was written. The application of the rules of the Law of Nations to the conditions which prevail in South America raises certain problems of a special character which are discussed by the author. In this connexion the Brazilian Declaration of Neutrality in the Chaco war of May 23, 1933, is printed in full and calls for particular notice. The three volumes taken

as a whole represent an achievement on which Dr. Accioly is to be congratulated, and those who seek to learn the Latin-American point of view will find in this work a wealth of valuable information and useful illustration.

H. C. G.

Introduction to French Law. By Sir Maurice S. Amos and Dr. F. P. Walton. Oxford University Press. 393 pp. (21*s*.)

The scope of this work is the same as that of the French Civil Code (viz. in English legal terminology, contracts, torts, infants, husband and wife, wills and intestate succession). It does not deal with the criminal, constitutional, or administrative law procedure, or private international law. Commercial law is not fully treated but there is a most useful chapter upon it. An exposition of French law is given which does not pretend to enable the reader to advise on a point of detail, which only a French lawyer can do, but which serves admirably as the background necessary for the English lawyer to understand a French legal opinion or judgment on a point of detail, or, when desiring to obtain information, to frame his questions to his French colleague in a manner which the latter will be likely to understand. A work of this kind is, moreover, admirable for the purposes of a study in comparative law or for gaining a knowledge of those elements of another legal system which is so desirable for a proper appreciation or understanding of one's own.

It would hardly have been possible to find anybody more fitted to perform this task than either of the two authors, both of whom have occupied offices of importance for a quarter of a century in countries where French civil law prevails and are at the same time eminent English lawyers. Their collaboration is almost a miracle and is due (as they state in their preface) to a happy coincidence. Each of them had in preparation a similar work at the same time and, this being discovered before their work was complete, they wisely decided to pool the results of their labours.

It is devoutly to be hoped that the response given to this work will encourage the Oxford University Press still further to increase the debt owed to them by English lawyers by bringing out similar volumes on French private international law and French procedure; both of these are really badly needed.

E.

Annual Digest of International Law Cases, 1929 and 1930. Edited by H. Lauterpacht. London: Longmans, Green & Co. 534 pp.

This volume, which made its welcome appearance at the end of last year, carries on the high standard set by the previous issues. The *Digest* now covers 1919–30 and it is to be hoped that the intervening period between then and the present time will soon be caught up so that we may come to have a yearly current digest up to date.

This volume contains digests of 124 decisions of international tribunals and 238 decisions of national courts, the latter covering 30 countries. As usual, a great variety of subjects is dealt with, and a flood of light is thrown upon both common and recondite points of international law, approached from many angles. Questions as to state succession, recognition of governments, state immunity, validity and recognition of foreign (chiefly Soviet) laws take up a

considerable part of the municipal decisions. Among the international cases perhaps the most interesting is the series of Mexican Claims Commissions cases —*France, Great Britain,* and *United States* respectively v. *Mexico*— some of which are not reported elsewhere. The *Shufeldt* ease (*U.S.* v. *Guatemala*) before Sir Herbert Sisnett, which involves important points with regard to the rights of foreigners under government contracts and is little known, is also included.

Certain alterations in typography and arrangement have been introduced which make for easier reading, and the digests are expandcd, where necessary, so as to give what is really a brief report of the case as a whole.

A. P. F.

Proceedings of the Australian and New Zealand Society of International Law, Vol. I. Melbourne University Press, 1935. pp. 188+xxvi. (10*s.* 6*d.* net.)

This volume contains an account of the foundation and objects of the Society of which it bears the name, as well as a collection of contributions of high value. The Society, as the reader is told in the preliminary notice, has been "founded for the purpose of fostering the study of public and private international law and in particular the study of those topics which affect or are likely to affect Australia and New Zealand". In truth "the increase which has occurred in the national status both of Australia and New Zealand since the Great War and the extensive economic interests of the two countries in the field of international trade havc brought to their peoples 'new' problems and responsibilities." The Governors-General and Chief Justices of Australia and New Zealand are patrons of the Society, Professor A. H. Charteris is President, and the Vice-Presidcnts and Councillors include men of light and leading in the lcgal worlds of the Commonwealth and thc Dominion.

The list of contributions gives an idea of the scope and variety of the international problems and contacts with which these members of the British Commonwealth of Nations have to deal: Sir William Harrison-Moore, whose death all studcnts of the affairs and constitutions of the British Empire deplore, writes on "Separate Action by the British Dominions in Foreign Affairs", tracing the rapid developments since the war and observing that "it appears idle to pretend that the principle of 'the diplomatic unity of the British Empire' has not been departed from or that the arrangements which now exist belong merely to constitutional usage and not to international relations and law". Sir John G. Latham, in an address delivered at the first dinner of the Society, contributes sound thought on the "Recent International Problcms" including non-recognition, economic sanctions, and the definition of Aggressor and Neutrality. Mr. Justice Evatt has an important discussion of the problems raised by the position of the British Dominions as Mandatories. And there follow articles on "The Soviet Union in International Law" (Dr. Patkin), "The position of Consuls in Australia" (Professor Charteris), "Italian Consular Incidents in North Queensland" (Dr. T. P. Fry), "Australia and the International Labour Conventions" (Professor Bailey), "The Statutory Basis of Extradition in Australia" (Mr. G. B. Castieau), "The Administration of Justice among Prisoners of War by Military Courts" (Mr. V. Le Gay Brereton), and notes on Prisoners of War Camps and the *Kisch* case by Sir John M. Harvey and Professor Charteris. The value of the volume is increased by the addition of a serviceable Index.

J. F. W.

Australia Law Journal—Supplement of November, 1935.

The foundation and activities of the Australian and New Zealand Society of International Law are not the only contemporary manifestations of the interest taken in international problems by the leaders of legal thought in the Commonwealth and Dominion. We commend to our readers the study of a paper read by Mr. Justice Evatt before the Australian Legal Convention of October 1935 on "The International Responsibility of States in the Case of Riots or Mob Violence—a Study of the Kalgoorlie Riots Case 1934"; the paper is printed in the *Australia Law Journal Supplement* of November 1935. The learned author submits the whole subject to very thorough discussion both of precedent and principle and with special reference to the attribution of responsibility in a federal state, such as the Commonwealth of Australia, as between the central Government and the component communities. In particular he examines with care the four propositions propounded as bases for discussion by the Preparatory Committee of the League of Nations Conference for the Codification of International Law convened in 1930, and, while accepting their main principles, establishes a weighty criticism on some points of drafting and in one respect at least of substance. This leads him to some important observations on the danger of early codification in international law. It is to be hoped that the learned author's reasoning and conclusions will be in the hands of all students of international law.

It should be added that the claims of the foreign countries concerned to secure reparation for the damage and injuries suffered by their nationals in the *Kalgoorlie* case had been settled before Mr. Justice Evatt's paper was written.

J. F. W.

L'Assistenza giudiziaria nei rapporti internazionali. By Ernesto Cucinotta, Professor in the University of Rome. Milan: Guiffré, 1935. xvi+320 pp. (L. 35.)

So far as the reviewer is aware there is no book in the English language which covers the same ground as Professor Cucinotta's detailed study of the various expedients which have been adopted in order to secure international collaboration in the realm of civil and criminal justice. This very useful treatise covers the ground thoroughly. It deals with the service of process, the taking of evidence, the execution of judgments, proof of foreign law, and also extradition, thus supplying a real need for a ready means of ascertaining the rules of the different countries which govern these matters. The learned author has carried out a piece of practical comparative investigation which cannot fail to be of great value to those who have to deal with litigation in the international sphere.

H. C. G.

La Clause "Dollar-or": La non-application de la législation américaine aux emprunts internationaux. By Martin Domke, 1935. Paris: Les Éditions Internationales. 100 pp.

This able monograph on the application to loans of an international character of Joint Resolution No. 10 of Congress of the United States (nullifying gold clauses) is written from the point of view of an advocate for the bondholders.

The author argues that, even as a matter of United States law, the Resolution does not apply unless payment has to be made in the United States. Other courts should not apply it, even so, if the transaction is an international one, because the clauses are *valeur or* and not for payment in gold coin, and there is nothing to make it illegal or impossible to pay even in the United States on a *valeur or* basis. If the contract is held, by the intention of the parties, to be subject to United States law, the parties must not be deemed to have intended to include a retrospective United States provision of this kind, striking down a clause in their contract.

The work is well written with a copious refcrence to judicial decisions and authors of all countries, and a good index.

The present writer believes that the author goes too far, and that the Joint Resolution would be held to apply, both by United States tribunals and other courts, to contracts where the "proper law" was the law of the United States (whatever the residence of the parties and wherever payable) and to all contracts so far as payment in the United States is concerned. M. Domke is probably too categorical in his assertion that the United States Supreme Court holds the clauses to be *valeur or* (the point is arguable, as the language of the judgments of February 1935 is none too clear): his view that the parties, when contracting to submit to United States law, did so only in respect of the United States law existing at the time of the contract is not one which has much authority to support it, and his argument that the place of payment is legally always the domicil of the debtor, even if the contract in terms provides for payment elsewhere, is unconvincing. But the monograph is invaluable for an investigation of the problem.

E.

The Catholic Tradition of the Law of Nations. By John Eppstein. Burns, Oates, & Washbourne, Ltd., 1935. xix+525 pp. (15*s.*)

This book should prove of great value, not only for the international lawyer, but for the student of jurisprudence. The tendency of the average English lawyer has been to confuse the organs of law with its essence, and he is inclined to dcny the very existence of the law of nations, since it lacks the visible organs of definition and enforcement to which he is accustomed. As a matter of historical fact, it is beyond dispute that international law is Christian in its origin and in its content, though it is not restricted to Christians in its application, and the law of nations cannot be understood without an adequate study of its spiritual foundation.

The basis of Mr. Eppstein's .book is a selection of documents beginning with familiar passages of the New Testament, and then followed through the Fathers and the canonists to the present day. The subject-matter is classified under five heads—the origins of Christian doctrine upon peace and war, the ethics of war, the preservation of peace, the society of nations, and the place of nationality in the law of nations. Under each head we are given the authoritative documents in chronological order, connected by an appropriate commentary. The range of the work is both wider and narrower than that of international law in the strict sense. It is wider in so far as it deals with such problems as the relation of government to the individual and the family, including some valuable pronouncements which serve to make clear the irreconcilable conflict between

Christian teaching and the conception of the totalitarian state. On the other hand, the international lawyer would welcome the inclusion of documents dealing with such problems as the obligation of treaties, the doctrine of *rebus sic stantibus*, and the recognition of new situations created by unlawful means. It is to be hoped that the call for a second edition will give Mr. Eppstein an opportunity of filling up these gaps.

H. A. S.

Le Droit international public de la mer. Tome III. La mer territoriale et la zone contiguë. Par Gilbert Gidel. Paris: Recueil Sirey, 1934. 813 pp.

A little more than a year ago Professor Gidel produced the third volume of the "Peace" part of his great work on maritime law. The contents of this volume may be summarized as follows: the historical development of the legal status of the waters adjacent to a coast over which states exercise some kind of sovereignty or control; their breadth; the legal character of territorial waters *stricto sensu*; the right of innocent passage both for public and private ships; fisheries; the bed and subsoil under territorial waters, and the air superincumbent upon them; the right of hot pursuit; the conception of *la zone contiguë* outside territorial waters; the British Hovering Acts; American "Prohibition" and "Liquor" treaties; *la zone contiguë* in relation to customs, security, fisheries; the precise method of measuring territorial waters, the fixing of the base line, generally, in bays, and in river mouths; "historic bays", or, more correctly and broadly, as the author points out, "historic waters" in certain bays, straits, and other places; islands and other elevations of the sea-bed; archipelagos; lateral delimitation of territorial waters between neighbouring states; and the effects of geographical changes.

In width of plan and in degree of detail the book is a remarkable production. The history, the *doctrine*, the *jurisprudence*, the actual practice of the principal maritime states, are all dealt with. The literature has been exhaustively ransacked. If Professor Gidel's treatment of the English literature may be regarded as a fair sample, it is unlikely that he has missed anything worth consulting. Indeed, if one may venture a criticism, it is that it is open to doubt whether some of the statements made by delegates at international conferences or by members and associates at meetings of the Institut de Droit International deserve the degree of immortality which Professor Gidel secures for them. As an example of the exhaustive character of his investigations I may mention that the chapter dealing with the fixing of the base line in bays consists of seventy-six pages.

One reflection occurs frequently to the reader of this volume. The Hague Codification Conference of 1930 was undoubtedly a great disappointment; nevertheless it, and the preparatory work which preceded it, produced from a large number of governments a mass of official information as to their opinions and their actual practice in the matters dealt with by the League Commission of Experts. It is often possible to deduce indirectly governmental opinion on the law from their action and dispatches, but it is only rarely that we get deliberate, official, and in some cases carefully prepared, expressions of governmental opinion such as were forthcoming during the period from 1924 to 1930. Professor Gidel has made very ample and skilful use of this source; it has helped in a marked manner to give freshness and actuality to his work and to differentiate

it from the endless repetitions of quotations from previous text-writers of which so many international law books are full to bursting.

We beg to congratulate our distinguished colleague upon this further instalment of the results of his immense labours, and wish for him—for his own sake and for ours—an early deliverance of the next.

A. D. McN.

Grotius Annuaire international pour l'année 1935. The Hague: Martinus Nijhoff. 392 pp. (Fl. 14.)

The main purpose of this publication is to give a comprehensive and accurate account of the part played by The Netherlands in current international life—the League of Nations, international bodies of various kinds, treaties concluded, &c. In addition, the present volume contains up-to-date information about the Permanent Court of International Justice, and the Permanent Court of Arbitration, as well as a number of articles on international relations and law, and a review of Dutch decisions on questions of conflict of laws.

A. P. F.

International Organization. By R. Yorke Hedges, LL.D. (Foreword by Paul Mantoux.) London: Pitman, 1935. x+212 pp. (10*s.* 6*d* net.).

This book, as Professor Mantoux rightly tells us in his Foreword, is a "short, clear, convincing account of the development of international organization, written not only as a guide for the student who enters the field of international studies but for the information of the general public (including many politicians)". The book is divided into three parts, dealing respectively with the Development of International Organization, the Organization of Peace, and International Co-operation.

A book which covers so much ground in so few pages must of necessity give conclusions rather than discussions. This is no disadvantage if the reader is thereby stimulated to thought rather than to an uncritical acceptance of text-book authority; in particular, the titles given to the three parts of the book must not mislead the student into supposing that international organization is well advanced, that peace is already "organized", or that international co-operation is in anything but a very rudimentary stage. Where the general handling of the subject is competent and effective, it is a pity that on points of detail or on matters not essential to the main thesis of the book there should be unnecessary openings for criticism; thus, the definition of a nation (p. 1) as "a social group united by common ties of kinship, by common culture, religion, and language" would leave very few nations surviving; the conditions for nationhood should surely be stated in the alternative. The dismissal of the theory of "fundamental rights" (p. 34) is rather summary. The "Cases" (Mémoires), "Counter-cases" (Contre-mémoires), "Replies" (Répliques) and (it may be added) "Rejoinders" (Dupliques) of the Permanent Court of International Justice are far from being the same thing as, or even similar to, the "Pleadings" of English law. The argument (p. 97) that Article 11 prevents the existence of what is called "the gap in the Covenant" —the gap, that is, which admits the legitimate survival of war—is not convincing. It is not quite accurate to say (p. 102) that the provisions of the General Act referring to the Permanent Court disputes as to the "respective rights" of states,

merely "repeat what the Court Statute has already done by the Optional Clause". The statement (p. 153) that "it is impossible to regard Article 16 as a piece of machinery which a breach of the Covenant will automatically bring into operation" needs revision, not only in the light of recent events but also because Article 16 does not come into operation on *any* breach of the Covenant but only in the event of a "resort to war" contrary to the Covenant's provisions. The statement on the same page that "so far as the military provisions are concerned, any state having a seat on the Council would be able to veto the Council's action, since unanimity is required" is disputable. According to the text of Article 16 the Council here "recommends" and for recommendations unanimity is not requisite. And even if unanimity were needed for such a recommendation, it is arguable that the Covenant does nothing to prevent military action by any Power disposed to resort to it; the Covenant-breaking state has "committed an act of war against all other Members of the League", and they are free to retaliate by war if they think well to do so.

O.

Das Problem des völkerrechtlichen Angriffs. By Dr. Wilhelm G. Hertz. Leiden: A. W. Sijthoff, 1935. viii+183 pp. (Fl. 2.50.)

The greater part of this book consists of a careful review of the attempts which have been made to define the circumstances in which a state could be held to have made an unjustifiable attack upon another. The author shows that until recently states have not had a clear notion of what they wished to define. They have widened the concept of aggression to include preparations for aggression, or have restricted it to unprovoked aggression or to aggressive war.

The only solution, then, is to give a definite meaning to aggression "an sich", apart from all extraneous elements. Dr. Hertz supports the test of chronological order proposed by Russia in 1933 and incorporated by her in several non-aggression conventions. The aggressor is the state which takes the initiative in resorting to force, whether the force amounts to war or not. A limited number of acts should then be specified which would become aggression if there was added the element of priority in time. Thus, a declaration of war, invasion of territory, attack by armed force upon the armed forces of another state, a blockade, &c., would be aggression unless preceded by one such act from the other side. Admittedly such a test is only the first step to collective security. It assumes the existence of an international body capable of impartially applying it. It leaves open the question of defining the acts constituting aggression, and aims at repression rather than at prevention. But it does something to promote clearness of thought where confusion now reigns.

J. W. J.

The Mineral Sanction as an Aid to International Security. By Sir Thomas Holland, K.C.S.I., K.C.I.E., LL.D. Oliver & Boyd, 1935. 96 pp.

This little book by the Principal and Vice-Chancellor of the University of Edinburgh, a leading authority on mining and mineralogical matters, has received a good deal of attention in those circles, but is not as well known as it ought to be amongst persons interested in international law and relations, and we should like to commend it to our readers. His main thesis is that Article 16 of

the Covenant being "too comprehensive and too drastic to employ without danger of disastrous repercussions", a much more suitable sanction could be found by an agreement amongst states "to refuse supplies of minerals (and therefore metals, raw or manufactured) to an aggressor". He bases this view upon two propositions: "(1) no industrialized nation can carry on without a continuous and sufficient supply of minerals, which may be wanted in enormously increased quantities for war; and (2) no country is self-contained as regards natural mineral supplies, and these cannot be made artificially or replaced by substitutes; they must be obtained from other countries".

Without the United States of America the value of this sanction would be very narrowly limited, but there is more chance of that country co-operating in a specific sanction such as this than in sanctions generally. Part I contains the argument for the adoption of the Mineral Sanction, Part II an examination of the mineral resources of the principal Powers, and Part III a study of the distribution of the principal mineral substances of use in war (including petroleum).

The book, which is an elaboration of earlier papers, was published most opportunely and, we have reason to believe, was found to be of great use in the discussion of the policy of sanctions applied against Italy. It has another and equally topical value, namely as a guide to the distribution of certain essential raw materials and the natural inequalities between states thus resulting, which was referred to by Sir Samuel Hoare in his speech at Geneva on September 11, 1935 and will, we hope, form the subject of an international inquiry.

The book, which is short and severely practical, is a good example of the aid which the expert scientist can contribute to a problem usually considered to be outside his sphere.

A. D. McN.

The First American Neutrality. By Charles S. Hyneman. Illinois Studies in the Social Sciences, Vol. XX, Nos. 1–2. University of Illinois, Urbana, Ill., 1934. 178 pp. ($2.50.)

In general all writers upon international law have recognized the importance of the contribution which the United States made to the development of the law of neutrality in the year 1793 and throughout the course of the general European war. Mr. Hyneman's book will not suggest any doubts as to the correctness of this general impression. What he has done is to give us a carefully documented account of the detailed history of this decisive period, explaining each problem as it presented itself to the American government of the day. The book is divided into nine chapters, and the ground covered by these chapters is substantially the same as that covered by the Thirteenth Hague Convention of 1907. The very fact that the statesmen of the new republic lacked international experience and were almost wholly unencumbered by foreign entanglements doubtless made it easier for them to approach the problems of neutrality in the light of principle. It is no small tribute to their sagacity that the rules which they invented to meet a *de facto* situation at the end of the eighteenth century were in substance approved by the collective wisdom of mankind at the beginning of the twentieth.

Mr. Hyneman's research enters into so much detail that its appeal will be mainly to the specialist, but it is an admirable example of the value of the historical method of approach to problems of international law.

H. A. S.

Az Állandó Nemzetkizi Bíróság Véleményezo Hatásköre. (The Advisory Jurisdiction of the Permanent Court of International Justice.) By Vitéz Csíky János. Szeged. 171 pp.

This Hungarian monograph, with which is included a summary in French, deals with the juridical problems involved in the advisory jurisdiction of the Permanent Court. These are approached from the point of view that the "dynamic principle" is of paramount importance, and the learned author shows how, as a result of its application, a widespread and highly valuable jurisdiction has grown out of the bare reference to advisory opinions in Article 14 of the Covenant. The controversial questions that arise in connexion with this aspect of the Court's work are discussed both from the theoretical and practical standpoints.

A. P. F.

Jahrbuch 1935 der Konsularakademie zu Wien. Vienna: Verlag der Konsularakademie, 1935. 151 pp.

The object of this publication, which is mainly intended for the students of the Consular Academy at Vienna, was noted in the *British Year Book* of 1935. The present issue contains a number of papers in the field of diplomatic history, economics, and international law. The latter includes papers by Brandner on Voidable Treaties, by Verosta on Legal and Political Disputes, and by Verdross on the proposed International Court of Revision.

They that take the Sword. By Douglas Jerrold. London: John Lane, 1936. 247 pp. (6*s*.)

Mr. Jerrold is not a lawyer, and he does not write for lawyers, but the lawyer will do well to study an acute criticism of the present world confusion by an experienced observer of foreign affairs. The weaknesses of the world organization attempted by the League system, as he sees them, are due to two main causes. In the first place, there is no common faith, philosophy, or culture, no agreed standard of internal government or political principle, uniting the various Members of the League. The result of this is that the meetings of statesmen at Geneva have degenerated into mere occasions for political bargaining, and that the League has no real corporate existence. Secondly, the Covenant is explicitly committed, apart from the abortive Article 19, to an unconditional perpetuation of the *status quo*, which brings it into inevitable conflict with a civilization which is essentially dynamic. This has resulted in attaching an exaggerated sanctity to the principle of non-intervention, which is based upon an illogical attempt to draw an absolute distinction between international and internal affairs. The strict rule of non-intervention in its turn leads to disastrous consequences within each individual state. Mr. Jerrold's argument does not easily lend itself to summary, but the following passage (p. 203) may be taken as fairly representative of the theme of much of his book:

"A closed international system means also a closed economic system and a closed domestic political system. It means the end not merely of emigration but of international trade. Without the ultimate security of a free sovereignty no nation can lend money abroad, or develop alien territories, or suffer its nationals to settle in foreign countries. The practice of non-intervention places all overseas enterprise at the mercy

of bandits and dictators. The blocking of the normal channels and the cessation of the normal growth of overseas trade leads to a dumping of the surplus products of the great manufacturing countries on each other, with the inevitable sequel of high tariffs and the reorganization of every governmental unit on a basis of self-sufficiency. This, in turn, necessitates the active intervention of the Government in every sphere of the national life and places the political machine at the mercy of the organized interests whose efficiency, well-being, and contentment become increasingly the price of mere existence."

Mr. Jerrold's book is controversial throughout, and few readers will be prepared to agree with every line. The lawyers, for example, may well dispute the doctrine (p. 114) that "a change of régime quite obviously justifies, and may even require, the repudiation of engagements". In this contention Mr. Jerrold will find embarrassing allies in the French revolutionaries of 1792 and in the Bolsheviks of 1918. But the reader will probably find that his dissent, whether occasional or continuous, only enhances the interest of a very stimulating essay.

H. A. S.

Kriegsrecht und Neutralitätsrecht. By Josef L. Kunz. Vienna: Verlag von Julius Springer, 1935. xii+334 pp. (RM. 28.)

This is a scholarly and able presentation of the law of war and neutrality in the concise form of a text-book. The treatise follows the traditional classification of the subject-matter. In the introductory chapter Dr. Kunz discusses the conception of war, the sources, the limits, and the enforcement of the laws of war. In a section entitled "Economic War", he deals with such matters as treatment of the enemy civilian population and their property, trading with the enemy, and enemy character. Chapter II is devoted, in unequal parts, to the presentation of the law of war on land, at sea, and in the air. The latter does not cover more than twelve pages and some will perhaps find it disappointing, in particular the summary account of the question of the use of aircraft for the purpose of detaining or capturing enemy or neutral vessels. However, the author's aim is to give an account of existing law, and he may be right in thinking that a text-book is not the proper place for developing the law by analogy or deduction from general principle. The second part of the book deals with Neutrality. It concludes with an illuminating chapter on the development of neutrality since 1920. This is perhaps the most vigorous part of the book.

On the whole, Dr. Kunz is content to rely on traditional notions and the majority view. It is sufficient to mention, for instance, his lack of hesitation in attaching importance to the current distinction between the Anglo-American and Continental conceptions of war. It would have been proper to draw the attention of the student to the view that owing to the changes in the scope and character of war that distinction has become for most purposes unreal and confusing. The common law prohibition of trading with the enemy, to which Dr. Kunz attaches importance in this connexion, is really irrelevant. What belligerent of the "Continental group" would nowadays allow its subjects to trade with the enemy? In discussing the procedural capacity of alien enemies, the author emphatically declares himself in favour of the German interpretation of Article 23 (*h*) of the Hague Convention No. IV. The reader ought to have been told the reasons upon which the British Foreign Office based its rejection of that interpretation. And it would have been useful to make it clear that, at least so far

as alien enemies resident in Great Britain are concerned, the inability to sue is in fact reduced to a minimum.

The author is, of course, thoroughly conversant with the German literature on the subject. But the book shows at the same time a knowledge of French, English, and American literature which goes far beyond purely bibliographical completeness. References to decided cases are abundant. In general, Dr. Kunz has written a useful and much-needed book, and it is to be hoped that, with suitable modifications and additions, it may be made available in the English language.

H. L.

Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–60. Vol. VI. Selected and Arranged by William R. Manning. Carnegie Endowment, Washington, 1935. xxxii+735 pp. ($5.00.)

The sixth volume in this series gives copious selections from the official correspondence of the United States with the Dominican Republic, Ecuador, and France. For the most part the subject-matter of the correspondence is political, but various questions of interest to the international lawyer will be found scattered throughout the volume. Among these we may mention the problems of navigation upon the St. Lawrence and the Amazon, proposals for an interoceanic canal, the abolition of slavery, the protection of citizens abroad, and the American attitude towards the Declaration of Paris. The editor's contribution is confined to occasional footnotes, and for the most part the documents are left to speak for themselves, but an excellent index assists the reader to follow the discussion of any particular problem.

H. A. S.

Le Droit pénal international, d'après la législation polonaise. Par Kopek Mikliszanski. (Nouvelle Collection d'Institut de Criminologie de l'Université de Paris.) Paris: Recueil Sirey, 1935. xii+185 pp.

The principles of an "international criminal law" and, as the readers of Professor Brierly's article in this *Year Book* for the year 1927 will remember, of an International Criminal Court, have not hitherto made much progress with English lawyers, nor, it is believed, with those communities which have inherited the English conception of criminal law. Criminal law is indeed the branch of law where national character and history are most firmly rooted and where there seems to be the least reason to press for the introduction of common standards and common procedure in communities of different organization, different traditions, and different stages of development.

Readers who wish to explore a realm of ideas rather foreign to the British lawyer may, however, profit by a study of this book. The general point of view of the writer may be gathered from such phrases (we quote from the preface and translate) as "By Penal Legislation (loi) we understand at the very outset, even before universal positive penal Law (Droit) is established, the single general norm of justice, valid for all countries and for all times"; "between criminal law (droit) and morality there is no fundamental difference". "International penal law, at any rate the law of the future, will have to rely much more on its moral ascendancy than on its sanctions. . . . By its legislative provisions,

deriving directly from human justice and of universal validity, the penal law will come to attack the very mentality of the offender, the conception of the crime which he creates for himself." The judge will not fail "to remove repression of crime from the domain of particular states so as to transfer it to the plane of the whole human community". This seems a long way from Sir James Fitzjames Stephen.

O.

La Guerra. By Giorgio Balladore Pallieri. Padua: Antonio Milani, 1935. vii+478 pp.

Professor Pallieri's book forms the third volume of a general *Trattato di Diritto Internazionale*, to which various authors have contributed. His treatment is in the main theoretical or philosophical, and the analysis of practice occupies a relatively small part of the book. About a quarter of the volume is devoted to a study of the legitimacy of war, both under general international law and in the light of the limitations more recently imposed by treaties. The decisive test of a "state of war", according to the author, lies in the intention of at least one of the parties to treat the facts as constituting a state of war. From this it follows, among other consequences, that methods of coercion not intended to create a state of war are not forbidden either by the League Covenant or by the Kellogg Pact.

Students in this country will not readily accept the author's view, for which no reasons are given (p. 314), that the British Prize Courts are administrative rather than judicial tribunals. Nor is it possible to accept, in the absence of a reasoned analysis, his sweeping condemnation of the measures taken by Great Britain and her allies during the Great War. Upon these questions Professor Pallieri's examination of the practice is much too brief to form the basis of a satisfactory judgment. For example, no attempt is made to appreciate the problems with which the Allies were faced as a result of the German unrestricted submarine campaign. The short sections devoted to the difficult questions of contraband and blockade make only the briefest references to the problems which the prize courts were called upon to resolve, and these sections cannot be accepted as offering a serious contribution to the discussion. But the book will be read with interest for its careful analysis of the more philosophical issues presented by the institution of war.

H. A. S.

Great Britain and the Law of Nations. Edited by H. A. Smith, D.C.L. Vol. II (Part I). Territory. London: P. S. King & Son. viii+422 pp. (16*s.*)

It should be unnecessary in a review of the second volume of this work to explain its character. So valuable is it for a study of international law that most readers of the *Year Book* will have been eagerly awaiting its appearance, as they are no doubt looking forward to its successors. The practice of the Government of the United Kingdom is shown by documents—nearly all of the nineteenth century though a few are more recent—extracted from the Record Office, and nearly all of them hitherto unpublished. About four-fifths of the space is occupied by the documents themselves and the remainder by the editor's notes and explanations, which are—speaking generally—sufficient and no more than sufficient to enable the reader to appreciate the original material, which is, as a

rule, left to speak for itself. The editor only rarely allows himself to express views and criticisms. When he does, they are cogent.

The present volume deals with (i) "Title to Territory" (the documents relating to the Falkland Islands and the Bahrein Islands are particularly interesting); (ii) the High Seas; (iii) Territorial Waters (perhaps the most valuable section, since there remain so many unsettled questions in this sphere, and the opinions of successive Law Officers of the Crown reveal especially clearly the legal problems and are illuminating, though they are not always consistent; there is much here that will surprise those whose reading on this topic has been confined to text-books); (iv) Straits; and (v) International Rivers.

A recurring difficulty, in appreciating the value of these documents from a legal point of view—a difficulty in which the editor helps where he can but which he cannot avoid—is to determine whether a statement in a diplomatic note is put forward as one of law or of policy. "His Majesty's Government cannot admit" this or that, we read, but does it mean that His Majesty's Government contest the legal right to do this or that, or that His Majesty's Government would regard such conduct as unfriendly opposition to their policy which it will meet with some form of political action?

Professor Smith in his preface says:

> "I am very clearly of the opinion that the good repute of international law among lawyers and its practical influence in the world of affairs have been gravely impaired by the excessive emphasis upon the doctrinal method of exposition. The law of nations, which functions without the aid of a legislature, an executive, or a true judiciary, is essentially a customary law. Custom rests upon the repeated acts of men and can only be ascertained by studying what men actually do. There is now a growing tendency, particularly in English-speaking countries, to approach the study of the law of nations from this point of view, and I believe this tendency to be entirely wholesome."

Professor Smith himself has been for long perhaps the most consistent and able exponent in this country of the view and the tendency referred to in my quotation. His first two volumes justify the natural expectation that he would be the ideal man to carry out a work which accords exactly with his own legal philosophy.

Opponents of the philosophy should, if they are wise, still welcome the work. If it is true that the philosophy tends to belittle new developments and, in its distrust of doctrine, to leave every question open because states on occasion advance almost every argument, it is also true that the doctrinal method is subject to the danger of premature crystallization upon insufficient data and inadequate understanding of all the complexities of the reality of things. The chapter on "Territorial Waters" in this volume, read in conjunction with a text-book on doctrinal lines, will illustrate this point.

E.

Le Droit commercial international, par Maurice Travers. Volume VII. Faillite et institutions analogues ayant pour but de régler la situation au cas d'insolvabilité ou de cessation de paiements d'un commerçant. Fascicule I. Principes généraux. Règles de compétence. Conduite de la faillite sur le territoire. Paris: Recueil Sirey, 1935. 501 pp. (Frs. 60).

This admirable treatise gives a clear picture of the bankruptcy and winding-up laws of most civilized countries. The eminent author advocates the principles

of unity and universality of bankruptcy. He shows that the plurality of bankruptcies greatly increases expenses, does not secure as well as the unity of bankruptcy equality amongst the creditors, and makes more difficult one of the aims of bankruptcy legislations—the rehabilitation of a *bona fide* bankrupt. M. Travers is of opinion that "le droit anglais se présente, en raison de sa valeur pratique, comme l'un des mieux conçus qui existe" (p. 156). But an English lawyer has to study general principles of the bankruptcy laws of other countries, and for that no better guide can be suggested than the book of M. Travers.

V. R. I.

Verspreide Geschriften, Tweede Deel, Internationaal Recht. By C. van Vollenhoven. Haarlem: H. D. Tjeenk Willink & Zoon N.V. 's. Gravenhage: Martinus, Nijhoff, 1934. vii+712 pp. (Guilders 16 (unbound), 17.50 (buckram).)

The early death of Professor C. van Vollenhoven on April 29, 1933, removed a man of great intellectual gifts and winning personality. At the age of twenty-seven he was appointed to the Chair of Indian Law at Leyden, but international law was also a lifelong interest.

The volume before us is the second of the three volumes of van Vollenhoven's collected papers posthumously published. Much of the contents is of an occasional nature, but the whole bears the stamp of an original and penetrating mind. The longest items are a graduating thesis on "The Scope and Content of International Law" (1898) and "The Three Stages of the Law of Nations" (1918). An English translation of the first of these was published in 1932 in Vol. X of the *Bibliotheca Visseriana*, and of the second in 1919. Neither of these translations is faultless. The thesis is a very remarkable work. It might with advantage be republished in a more accessible (and revised) translation. For van Vollenhoven international law was not a derogation from national sovereignty, but (derivatively) an expression of it. Its function was to occupy the field of those juridical relations between states and between individuals, to which the authority of single states cannot at all, or conveniently, extend. The effective realization of international law implies, so van Vollenhoven believed, the existence of an international police force. To this principle, asserted in his undergraduate thesis, he remained faithful throughout his career. He reiterated it in a communication made to the twentieth Universal Peace Congress held at Berne in 1914, and in one of the pieces of latest date included in this collection (1929) endorsed a proposal for an international air police. This volume is a worthy monument of one phase of van Vollenhoven's many-sided activity.

R. W. L.

The Sino-Japanese Controversy and the League of Nations. By Westel W. Willoughby. Baltimore: Johns Hopkins Press; and London: Oxford University Press, 1935. xxv+773 pp. (22*s.*)

This is a detailed account of the handling of the successive stages of the Sino-Japanese dispute of 1931 by the League. It contains two parts: the first a chronological account of the dispute before the League, given largely in the form of copious extracts from official documents and speeches; the second a discussion of the questions of principle arising out of the dispute. The early chapters

contain a slight sketch of the historical and political background, but it was not part of the author's purpose to deal fully with this.

Professor Willoughby has acted as adviser to the Chinese Government on many occasions, including much of the period covered by the dispute with Japan, and he very fairly points out that his own sympathies are strongly on the Chinese side. But he has made a sincere attempt to present the story objectively, and in any case the quotations and references are so full that the reader can easily correct the bias. Probably, too, most readers will agree with the author's view that a favourable presentation of the Chinese case is a necessary result of the facts of the controversy, as they will also with his final conclusion, since unhappily corroborated by a later controversy, that the essential reason of the failure of the League was not any unsuspected organic weakness, but merely the unwillingness of those of its members whose voices were controlling to honour the obligations they had assumed.

From a purely legal point of view perhaps the main interest of the book is the light that it throws on the articles of the Covenant *in action*. To see the motives which induced China to appeal or not to appeal to such and such an article in such and such circumstances, or to take one point in debate and to omit another superficially equally cogent, is an experience not unlike that of the law student when he leaves the University and enters the chambers of a practising barrister. The discussion of more general questions, self-defence, the meaning of "resort to war", the so-called Japanese Monroe Doctrine, in Part II of the book, is also very good, and has an interest not confined to the Sino-Japanese dispute. The book is a real contribution not only to the history of that dispute, but to an understanding of the League.

J. L. B.

International Law. By George Grafton Wilson and George Fox Tucker; Ninth edition, by George Grafton Wilson, 1935. New York: Silver, Burdett & Company. xxvi+372+clvii pp. ($4.00.)

When a work on International Law reaches its ninth edition in the lifetime of one of its authors, there is usually little for a reviewer to do save to offer his congratulations and note the changes that have taken place since the preceding edition. As, however, this book is not so well known here as in the United States, some indication of its contents should perhaps be given. It is a manual in which, after an historical introduction, most of the topics of international law are dealt with, under the respective headings of Persons, Peace, War, and Neutrality. The manner of treatment overcomes many of the difficulties of compression; though footnotes are kept to a minimum, the student anxious for further information on a particular point may be assisted by looking through the bibliography at the beginning of the book. While to readers on this side of the Atlantic it may seem that more space should have been given to the League of Nations in its various aspects, they should perhaps not so much criticize as note a difference of outlook. If, however, space is economized in the body of the book, in the appendices it is generously used. These contain the texts of documents, ranging in date from 1856 to 1929, and include, among others, items of such diverse interest and importance as the Instructions of 1863 for the Government of United States Armies, certain of the Hague Conventions, the Declaration of

London, and the Covenant of the League of Nations. It is not only students who will appreciate the convenience of having such a collection of documents in the same volume.

P. L. B.

The United States and Neutrality. By Quincy Wright. Public Policy Pamphlet No. 17. University of Chicago Press and Cambridge University Press. ii+29 pp. (25 cents. 1*s.* 3*d.*)

This little pamphlet, though published in May 1935, before the recent developments in American neutrality policy, will be found very useful by those wishing to understand the traditional American attitude towards neutrality and its modifications in the recent past. The pamphlet deals with (1) Probability of keeping out of a general war; (2) Nature of neutrality; (3) Past American policy with respect to neutrality; and (4) Proposed policy. It is the work of a scholar, and it does not fail to be a scholarly piece of work because it is written in a popular style.

A. D. McN.

The Power of the International Judge to give a decision "Ex Aequo et Bono". By Dr. Max Habicht. London: Constable & Co. Ltd., 1935.

This monograph is based on the material of the lectures delivered by the learned author at The Hague Academy of International Law in 1934, and contains a clear examination of the term *ex aequo et bono* as it has developed in recent times. Dr. Habicht, however, limits his inquiry to an explanation of the procedure in existing international law, without attempting to give a forecast of its future developments. The power of an international judge to apply equity, as opposed to law, is already recognized in the treaties now in force between Germany and Switzerland, Italy and Switzerland, and Belgium and Sweden. In addition, the General Act of 1928 contains the *ex aequo et bono* clause. The author's aim is to prove that modern international law provides for an equitable settlement by international courts, as opposed to the application of the rules of law, for the purpose of advancing the "Equity Tribunal" advocated by the "New Commonwealth Institute". In its ordinary interpretation, however, the term should be construed as being directly related to justice and would, therefore, in practice be identical with Article 38 of the Statute of The Hague Court, which empowers that tribunal to decide a case *ex aequo et bono* if the parties agree thereto. If, on the other hand, the "Equity Tribunal" is intended to replace the legislative body now lacking in international relations, it would surely be rendering a poor service to international courts if they were asked to legislate for the international community, as nothing appears more undesirable than that the legislative and judicial functions should be confused. The analogy of equity in the Roman or English law, to which the author seems to give his support, is clearly inapplicable to international relations under which a state is only bound by rules accepted by it expressly or impliedly.

C. J. C.

Oppenheim's International Law, Vol. II, Disputes, War and Neutrality, 5th Edition by H. Lauterpacht. Longmans, Green & Co. ii+782 pp. (45*s.* net).

No better guarantee than Dr. Lauterpacht's name could be afforded of the

care, erudition, and insight necessary to a new edition of *Oppenheim's International Law*, of which this volume is the first instalment.

It is impossible at this time to read a treatise on the laws of war and neutrality without a certain feeling of unreality. The layman must often be tempted to compare the present position under international law to that which would exist if municipal law, having prescribed that murder was a crime, were to formulate detailed rules as to the manner in which that crime, if committed, was to be carried out; and reflections of an analogous kind might be made with reference to the laws of neutrality. Dr. Lauterpacht nevertheless gives convincing reasons for the view that the study of the laws of war and neutrality must continue to be a legitimate object of the science of international law.

This edition contains a number of new or mainly new sections, of which a list is given in the preface, most of them relating to the law and machinery for the pacific settlement of international disputes. Of particular interest among them at the present time is that which deals with "Sanctions in the Theory and Practice of the League" (52 f). This section would no doubt have been considerably expanded but for the fact that the edition was completed in June 1935, before detailed experience of the application of sanctions was obtained in the case of the Italian aggression upon Abyssinia. It is for the same reason, in all probability, that the sections on "Neutrality and the League of Nations" remain substantially unchanged from the previous edition. In his introduction, indeed, Dr. Lauterpacht suggests that one of the most important tasks for the future must be to translate into terms of positive international law the changes in the rules of neutrality which result by implication from the Covenant and have become necessary in consequence of the Kellogg Pact.

Dr. Lauterpacht also refers to Hall's famous prophecy in the preface to the third (1889) edition of his work on international law, as to the nature of the next war. Hall doubted whether it would be scrupulous, either on the part of belligerents or neutrals. But he believed it would be followed by a reaction in favour of greater strictness in the observance of the laws of war and neutrality and of international obligations in general. The first part of Hall's prophecy was undoubtedly fulfilled, but Dr. Lauterpacht considers it questionable whether the same can be said of the second. At the moment of writing the outlook is particularly discouraging. Breaches or repudiations of treaties too recent to need specific mention, and on the part of more than one country, have greatly shaken confidence in the efficacy of international undertakings. In the sphere of war the same thing has occurred owing to the Italian use of gas, in contravention of treaty obligations prohibiting its use. The average man can scarcely be blamed if he considers the elaborate rules of international law for the conduct of war to be little more now than the expression of pious hopes.

In this connexion Dr. Lauterpacht has a significant suggestion to make. He points out that the fundamental basis, or one of the fundamental bases, of the laws of war lies in the distinction drawn between combatants and non-combatants. It is largely because this distinction, blurred in the last war, is likely to be completely obliterated in the next that little reliance is to be placed on the observance of those laws. In Dr. Lauterpacht's view, one of the most urgent tasks for the future must be to restore and reinforce this distinction. No one will deny the desirability of such action but many will doubt the possibility of achieving it, and the average man will again be forgiven if he considers that the task of

the future lies less in securing the observance of the rules of war than in preventing war from occurring at all. Dr. Lauterpacht, for his part, points out that this can only be achieved if nations are willing to face the full implications of their membership of the League. At present, however, there is still being witnessed "the phenomenon of humanity recoiling before the boldness of its effort to translate into terms of law and order the lessons of history"

G.

Vollmacht und Ratifikation bei völkerrechtlichen Verträgen nach deutschem Recht. By Dr. jur. Hans Otto Meissner. Göttingen: Vandenhoeck and Ruprecht, 1934. 99 pp. (RM. 4.80).

This is a useful and interesting monograph on the subject of Full Powers and Ratification in connexion with international agreements, considered from the point of view of the constitutional requirements of German law.

G.

Staat und Gebietshoheit. By Dr. Adolf F. Schnitzer. Zürich, 1935.

Dr. Schnitzer treats the subject of territorial sovereignty as a special problem in international law requiring rules of its own. His analysis of the various doctrines for the acquisition of territories in the past is excellent, and covers a whole historical background. The particular point of view which derives from original occupation is reflected in the Anglo-American doctrine of "inchoate rights", so admirably expounded by Westlake. The author favours the theory that a first discovery of a territory must be followed up by a proper occupation within a definite period which should vary according to the times, the accessibility of the territory, and its importance, and he bases his argument on Article 10 of the Convention of Saint-Germain of 1919 which reaffirms the well-known principle that a state is bound to maintain in its territories sufficient police forces to ensure "the protection of persons and property".

C. J. C.

La Sécurité collective. Lwow, 1935.

This volume contains eight articles presented by the Central Polish Committee to the Eighth Conference of Advanced International Studies, held in London last June. Although the value and standard of the articles vary considerably, they are all, more or less, connected with the problem of "collective security".

Professor Ehrlich contributes three weighty articles on—(*a*) the development of international law and the problem of collective security; (*b*) the respect for international obligations and the revision of treaties, with a critical analysis of Article 19 of the Covenant of the League of Nations, and (*c*) the problem of justiciable disputes and of conflicts of interests, in which the author argues that every dispute is a justiciable dispute on the ground that where no rule exists binding on the parties to the dispute, there is no room for international jurisdiction, and consequently no dispute is in existence.

Mr. Komarnicki deals with the definition of an aggressor and considers that the best definition must be based on the "territorial" criterion. Every measure of force or armed action by one state on the territory of another state would constitute an aggression, unless justified by international law, such as the necessity of resorting to force under the Covenant of the League, the Treaty of Locarno, or the Briand-Kellogg Pact.

This definition appears to neglect the doctrine of self-defence and also the fact that an invasion of territory may be effected by both states almost simultaneously, when it becomes difficult to ascertain which state was the first to start hostilities.

Mr. Makowski examines the pacific measures for the solution of international disputes in the various clauses contained to that effect in the Covenant, the Pan-American Union, and the treaties entered into by the Little Entente, and the Balkan and Baltic Ententes.

The other articles, which are all clearly written, are: "The Non-aggression Pacts", by Mr. Deryng; "The Internationalization of Civil Aviation from the point of view of collective security", by Mr. Grzybowski, and "The Problem of Control and the Work of the Disarmament Conference", by Mr. S. E. Nahlik.

C. J. C.

Concordats et droit international. By H. Wagnon. Gembloux: Duculot, 1935. 441 pp.

This volume deals with the juridical character of concordats, the method of their conclusion, their relation to municipal law, and the cessation of their effects. It contains a masterly survey of the facts and critique of the literature of the subject. The author distinguishes clearly between the international position of the Vatican City, which has made treaties and adhered to Public International Unions, and that of the Papacy as supreme organ of the Catholic Church. The latter was not affected in law by the suppression of the Papal State between 1870 and 1929. The Papacy continued to have diplomatic relations with states and to conclude concordats with them. With regard to the fundamental problem of the nature of concordats, M. Wagnon repudiates the theory that they consist of privileges granted to states and revocable at the will of the Holy See. He also demolishes the theory of the nineteenth-century Liberals that concordats are but legislative enactments of states. International treaties and concordats derive their force from the same principles of natural law and agreed custom, not from the legislative competence of the parties. They are the outcome of diplomatic negotiations and are given the same solemn forms. Concordats, like other treaties, have been registered at the Secretariat of the League of Nations. When states have denounced concordats, they have usually invoked the clause *rebus sic stantibus* or some other justification, and have not treated their act as being solely within their domestic jurisdiction. Yet there are differences between a concordat and an interstate treaty. The subject-matter of the one is largely different from that of the other. And a treaty affects two distinct populations, while a concordat applies to but one society. In fact, the Catholic Church has kept alive in a world of territorial states, which tend in greater or less degree to be totalitarian, the conception of human society as divided between the temporal and the spiritual authorities. Accordingly, the author, while insisting that a concordat is a diplomatic convention, will not define it as an international treaty, but falls back on the form "a quasi-international treaty".

The book is a mine of information on the application and interpretation of concordats, on the effects of change of régime and of state succession, and in particular on the history of the concordat of 1801 in Belgium, the Netherlands, Luxembourg, and Alsace-Lorraine.

R. G. D. L

REVIEWS OF CURRENT PERIODICALS

American Journal of International Law, Vol. XXIX, 1935.

In the January number the "Codification of International Law" is discussed by Mr. Philip Marshall Brown. The method of codification by treaty enactment is rejected, and the interesting suggestion is made that the League might entrust the *Institut* with the task of restating customary international law. Miss Josephine Burns examines the "Conditions of Withdrawal from the League of Nations", and Mr. J. Mervyn Jones argues convincingly against the "Retroactive Effect of Ratification of Treaties". Mr. Charles M. Wiltse analyses the views of "Thomas Jefferson on the Law of Nations", and Professor Manley Hudson contributes as usual his most valuable survey of the work of the Permanent Court in the preceding year.

In the second number Mr. Charles Warren points out the danger of unpreparedness for the duties of neutrality, and presses for an agreement regulating the operation of belligerent aircraft against neutral trade. Professor Lawrence Preuss writes on the "Position of Aliens in National Socialist Penal Law Reform", which may give rise to international complications. Mr. Charles Fairman discusses common law and equitable analogies relevant to the problem of "Implied Resolutive Conditions in Treaties". "Extraterritorial Jurisdiction in the Ancient World" is described by Mr. Shalom Kassan, and Dr. Sandifer contributes "A Comparative study of Laws relating to Nationality at Birth and to Loss of Nationality".

The third number opens with an important discussion of the "Concept of Aggression in International Law". Professor Quincy Wright suggests a "procedural" test of the aggressor—that state which, under an obligation not to resort to force, is employing force against another state, and refuses to accept an armistice proposed in accordance with a procedure it has previously accepted. While this test is suggested as being both just and practical, it is recognized that other and less formal tests of aggression will be relevant to the kind of armistice to be proposed to the disputing parties. Other articles in this number discuss the "Armed Neutralities of 1780" (Professor Carl J. Kulsend) and "Discovery in International Law" (Dr. Friedrich Freiherr von der Heydte).

Of topical interest and importance in the October number is the joint article by Professor James W. Garner and Valentine Jobst on the "Unilateral Denunciation of Treaties by one Party because of alleged non-Performance by another Party or Parties". Contrary to the opinion of the majority of text-book writers, a strong case is made out, on principle and by precedent, for the rejection of such action without the agreement of the parties or reference to some judicial authority. Other articles include an explanation by Dr. James Brown Scott of the Neutrality Resolutions and Proclamations of 1935, and a criticism by Professor Manley Hudson of the use of the Permanent Court proposed by the Special Assembly of the League in 1934 for dealing with the Chaco Dispute.

The notes in each volume contributed by the Editors afford a most valuable commentary on current problems of international law particularly affecting the policy of the United States. Disputes on the American Continent, the Senate and the World Court, the problems of the Philippines, Senator Hull's trade

agreements, and the recent neutrality legislation are among the topics reviewed. In addition to the usual Chronicle of Events, Reports of Judicial Decisions, and Reviews, there is a most valuable supplement in three volumes containing Draft Conventions prepared by the Research in International Law of the Harvard Law School.

B. E. K.

Revue générale de droit international public. 1935.

The *Revue Générale* has a considerable number of articles on subjects of present interest. Dr. Mandelstam follows up his article on "L'interprétation du Pacte Briand-Kellogg par les gouvernements et les parlements des États signataires" with an interesting article on "L'interprétation du Pacte de Paris par les organes de la Société des Nations". He analyses the conclusions as to the Pact of Paris which can be derived from the efforts made by the League with a view to bringing the Covenant into harmony with the Pact; his final conclusion is, however, that it is not desirable to attempt to amend the Covenant with a view to such harmonization. Dr. Mouskhěli in "Le plébiscite de la Sarre" gives a detailed description of the arrangements made for carrying out the plebiscite. While he criticizes the basis on which the right to vote was given and the fact that no right of option for another nationality was given to the members of the minority who voted against return to Germany, he holds that "Sans aucun doute le plébiscite de la Sarre constituera pour l'avenir un modèle à suivre et tous les plébiscites futurs s'inspireront de lui".

Professor Pintor of the Royal Egyptian University has an interesting article on "Traités internationaux et droit interne" in which he discusses the question of the effect upon the international position of a treaty of a failure by one of the parties to comply with its constitutional requirements in connexion with the conclusion of treaties. Professor Pintor's conclusions correspond closely with those reached by Mr. Fitzmaurice in his article "Do Treaties need Ratification?" in the 1934 volume of the *Year Book*. Professor Cosentini, Director General of the American Institute of Comparative Law and Legislation, has performed the remarkable task of codifying the whole of international law, and in an article on his "Code international de la paix et de la guerre" he explains the principles on which he has worked. Part IV of the Code, which deals with "Les Conflits internationaux et leurs moyens de solution pacifique" is printed as an Annex. In this part the author seems to have combined all the methods of pacific settlement of disputes which have been adopted or proposed, and it is not very clear how the method to be adopted for settling any particular dispute is to be selected from the numerous, and in many cases mutually incompatible, procedures which are laid down. There is also a chapter on the limitation and control of armaments, a good deal of which seems to be the original work of the author; it provides *inter alia* for the supply of contingents to an international force to be placed at the disposal of the Council of the League.

Monsieur E. Staley has an interesting article called "Une critique de la protection diplomatique des placements à l'étranger" in which he discusses the merits and demerits of the system under which a government is regarded as entitled to intervene diplomatically for the protection of its nationals' commercial interests in foreign countries, and reaches the conclusion that the disadvantages of the system outweigh its advantages. He would apparently prefer

that the protection of such interests should be entrusted to some international body, though he points out that this would not eliminate one of his main objections to the system, which is that questions of this nature are apt to be treated on a purely legal basis. In a subsequent article he gives suggestions for something to be substituted for the existing system of diplomatic protection in the case of capital invested abroad; he suggests a world investment commission under the auspices of the League, a world tribunal of commerce to which individuals would have access, the constitution of companies possessing world nationality with an international registration office for them, a world investment bank, and a world consular service.

Professor Ahmet Rechid's "Les droits minoritaires en Turquie dans le passé et dans le présent" is an account of the rights and privileges enjoyed by non-Moslem minorities in Turkey in the past (and particularly in the period following the capture of Constantinople) and under the constitution of to-day. Professor Cavaré of Rennes has a long article on "La Reconnaissance de l'état et le Mandchoukouo". The first half is a defence of Japanese action and a criticism of the Lytton Commission and the League; the second half is a very technical discussion of the nature and effects of recognition. His general conclusion seems to be that the position of Manchukuo is now such that she is entitled to expect recognition, though the action of the League prevents its Members from according it.

Monsieur L. Kopelmanas contributes a long and interesting discussion of Article 11 of the Covenant. His view is that while the procedure under the second paragraph of the article is satisfactory and has given good results in cases where there is no danger of war (he seems to agree that the article ought not to be applied at all in cases of unimportant disputes such as the *Swiss claims* and the *Finnish ships* cases), the procedure under the first paragraph has not been, and cannot be, effective as a means of preventing or stopping war, since the Council has no power to impose its decisions on the parties. He holds that in order to make the article effective it is necessary that the Council should be bound to intervene in every case of war or danger of war, and that the Permanent Court should have the power to order the Council to act if it failed to do so; that decisions of the Council intended to stop hostilities should be taken by a simple majority and should be binding upon the parties; that the Council should be entitled to impose upon the parties a means of settling the dispute (all disputes, even non-justiciable ones, should go to the Permanent Court of International Justice); and finally that the Council should have power to enforce the solutions there reached. For this purpose he thinks that an international police force would be necessary, but does not consider that this is at present practicable. The Registrar of the Permanent Court of International Justice has an article on Article 37 of the Statute of the Court, which has apparently given rise to difficulties. In his view its effect is that where a case is claimed to fall within the jurisdiction of the Court in virtue of that article the Court cannot consider itself incompetent *prima facie*, but the defendant has the right to dispute the Court's competence; if he fails to establish his contention, the Court is competent.

Professor Preuss of the University of Michigan discusses "La Conception raciale nationale-socialiste du droit international", which according to him regards international law as regulating only the relations between the "nordic" peoples. Professor Preuss describes this theory as "fausse dans ses affirmations,

confuse dans son raisonnement et anarchique dans ses principes". Doctor Fairman has an interesting article on "La Loi américaine de neutralité du 31 août 1935 appliquée au conflit italo-éthiopien". His conclusion is that the idea of "non-intervention" in time of war cannot stand critical analysis, but he considers that at the moment the American nation is "entièrement livrée à la neutralité", although the inherent defects in this idea are apparent on examination.

W.

Revue de droit international et de législation comparée. Tome XVI, 1935.

The articles in this *Review* during the last year deal as usual with a great diversity of subjects. Many of them will be of the utmost value to the international legal practitioner.

The volume opens with an article by M. Åke Hammarskjöld on "Les Immunités des personnes investies de fonctions d'intérêt international", that is to say, if one may use an abbreviated but somewhat inaccurate title, the immunities of non-diplomats. This is one of the subjects on the agenda for the 1936 Session of the Institute of International Law. International relations involve nowadays the employment of so many persons whose functions are not diplomatic in the strict sense of the term and who yet are engaged on the business of the state that it is well to have the subject scientifically thought out. The article will certainly be of great assistance in arriving at a logical and practical set of rules on the question.

Professor Charles De Visscher's article on the international protection of works of art deserves careful study. He treats at length the problems which arise in time of peace as well as in time of war. In time of peace one of the difficult questions is the enforcement in foreign countries of the legislation adopted in various countries to prevent the export of works of art. Reciprocal aid in the enforcement of such legislation is improbable, as neither the interests nor the situation of the various countries concerned coincide, but more might be done in the way of mutual aid in the case of theft of works of art from museums.

The war-time problems in connexion with this subject have been aggravated by the great advance in aerial armaments and by the absence of any international agreement to regulate bombing from the air. It is to be hoped that Professor De Visscher's article will focus attention on this important question.

Dr. van Praag writes on the subject of the immunity enjoyed by one state from the jurisdiction of the municipal tribunals of another state, and upon the analogous question of the enforcement of any judgment which may be given in such tribunals in cases where the jurisdiction is admitted. The author discusses the question whether immunity might not arise by custom. The most pressing case is that of state-owned ships engaged in commerce. It is difficult to see why such vessels, if they are to compete commercially with privately owned merchant vessels, should enjoy any immunities. Dr. van Praag's article is well worth reading.

Among many other articles, all of great merit, mention may be made of one by Mr. Arnold Raestad on the distribution of information by broadcasting, in which he describes and explains the draft convention which has been drawn up by the Institute of Intellectual Co-operation at Paris. This draft has now been communicated by the League to governments for their observations. Its primary

purpose is to ensure that broadcasting shall not be used to endanger the peace of the world or to incite the inhabitants of another country to rebellion, sedition, or civil war.

Mr. Raymond Weiss contributes an article on the need of an international tribunal to decide questions relating to the interpretation and the application of the international copyright conventions, a defect which it is hoped may be remedied by the Conference due to meet at Brussels this year.

Dr. Clyde Eagleton discusses some of the recent decisions which have been given by international tribunals in cases where the objection was advanced that remedies provided by the local tribunals had not been exhausted. Modern tendencies appear to be departing from the old standards. Some authoritative body of rules on this subject would be of great service.

M. Jacques Dumas, Conseiller à la Cour de Cassation de France, writes on the "Fondement juridique de l'entr'aide internationale pour la répression du terrorisme". The subject is one which has acquired increased importance since the tragic occurrences at Marseilles in 1934. Terrorism, in the author's opinion, can only be dealt with internationally, and must be dealt with on the footing that such crimes are not political and must not therefore escape the operation of extradition treaties.

Dr. Elfried Härle, of Kenzingen, Baden, contributes a useful study of the "General principles of law" as a source of international law. Now that most states are bound by the Statute of the Permanent Court of International Justice, Article 38 of which lays down that after international conventions and international customs the Court is to apply the general principles of law recognized by civilized nations, it is important to know what exactly is the meaning to be given to this provision. Hitherto, the Permanent Court itself has not thrown much light upon the question. Dr. Härle's article provides a valuable commentary upon it.

The volume contains excellent notices of books and periodicals which have been published during 1935.

C.

Rivista di diritto internazionale, Serie III, Vol. XIV (1935). Athenaeum, Rome.

By the death of Professor Cavaglieri the *Rivista* has lost one of its editors and a contributor who gave of his best to its pages. It is a tragic coincidence that the first number of the volume now under review should contain his last work, a discussion of the very difficult and delicate problems which arise in connexion with the application to international treaties of the principle of avoidance of a contract by reason of duress and of the views formulated on this question by Professor De Visscher and Dr. Lauterpacht. Cavaglieri was much esteemed and liked by his English colleagues and his death removes one of the links between English and Italian legal thought which are all the more important and valuable at this juncture by reason of existing world conditions.

The retirement of Professor Diena from the Chair of International Law at the University of Pavia forms the subject of an appreciation by Professor De Francesco of the career of a great internationalist and a leading exponent of the principles governing the Conflict of Laws. Professor Diena takes with him into retirement from active life the good wishes of all English international lawyers and the hope that he may long enjoy the repose which he has so fully earned.

The *Rivista* also contains an interesting résumé by Professor Pallieri of Kelsen's theories as to the relation between international and municipal law and a critical examination by Professor Ghiron of Dr. Frankenstein's views as to the nature of Private International Law.

H. C. G.

Zeitschrift für öffentliches Recht, Band XV (1935).

Eight of the twenty-one contributions to this volume are of interest to the international lawyer. In the first number Dr. Felix Lachs subjects the problem of the freedom of the seas to a purely formal analysis which admits no discussion of positive international law. In the second Dr. Hans Herz discusses the problem of the continuity of states from the different viewpoints of the theory and practice of international law, the theory of the state, and general legal philosophy. Both these articles illustrate the characteristic contribution of the *Zeitschrift*—the application to international law of the technique of the Viennese school of jurisprudence. Dr. Herz warns us advisedly in a footnote—"it is assumed that the reader is familiar with the fundamental principles of Kelsen's pure science of law".

In the third number, however, positive international law comes into its own. It opens with a short but important article by the Editor, Professor Alfred Verdross. His title, "Void and Voidable Treaties" covers a temperate plea for the recognition of the Versailles "Diktat" as partly voidable for duress exercised after the acceptance of Wilson's "Points", and partly void as conflicting with a nation's moral right to adequate self-defence. The competence of the Permanent Court to pronounce on these matters is illustrated from the dissenting judgment of Schücking in the *Oscar Chinn* case, and the Court is suggested as the means of giving the "Diktat" a peaceful burial. Dr. Wilhelm Hertz follows on the thorny problem of the aggressor, and endeavours to discern the common element in the different notions of aggression employed in positive international law. Dr. Stross recounts the development of exterritoriality in Egypt since 1919, with special reference to the Austro-Egyptian Treaty of 1929, and is followed in the next number by Dr. Otto Peter-Pirkham, who deals with the Mixed Courts.

In the last number Professor Ernst Wolgast makes a thorough examination of the question whether the Treaty of Versailles may be said to contain a promise of amnesty for the Flemings in Belgium who gave support to the German administration during the occupation. This he answers in the affirmative, and quotes letters in the same sense from Professors Strupp and Verdross. Professor Knud Berlin discusses the history of Iceland's status in an article severely critical of Dr. Ragnar Lundborg's recent book on the same subject.

A word must be added in gratitude for the usual number of excellent reviews, and to Dr. Kunz, Dr. Verosta, and Professor Verdross himself, on whom this work chiefly falls.

B. E. K.

Niemeyers Zeitschrift für internationales Recht. Band L. Berlin: Verlag Franz Vahlen, 1935.

The fiftieth volume is in the competent hands of Professors Niemeyer and Kraus. It includes a long discussion by Heinrich Rogge of the War-Guilt

controversy, giving the programme of work on the subject which the learned author proposes to undertake, an interesting article by Wolfgang Küster on the Status of the Little Entente in international law (a question to which too little attention has hitherto been given in this country), a discussion by Erwin Riesch of the employment of poison-gas by aeroplanes "in the light of international law", a study by E. Staedler of the Papal Bulls of Alexander VI on the Sovereignty of the World of the Western Indies, and articles by Stefan von Szászy and Isidor Schwartz deal with the recognition of foreign arbitral awards and with the Hungarian practice in matters of foreign succession. There are also documents and reports of decisions, as well as notices of the 1931, 1932, and 1934 meetings of the Institute of International Law and book reviews. The Index might usefully be enlarged.

J. F. W.

Nordisk Tidsskrift for International Ret. (Acta scandinavica iuris gentium.) Vol. VI (1935).

This volume contains, as usual, the lectures given at the Nobel Institute of Oslo by Dr. Raestad; the subjects are: Reprisals in time of peace; International recognition of new States and Governments; Collective security.

Dr. Raestad also contributes an article on the Berne and Paris Conventions concerning the protection of intellectual and industrial property, and recommends the adoption of a special jurisdictional clause for the settlement of disputes arising under these conventions. This clause should either be inserted in the Conventions themselves or be embodied in a special protocol.

M. Rafael Erich (Finland) examines the problem whether the admission of a state as a Member of the League of Nations involves the international recognition of that state by the other Members of the League.

The volume also contains, *inter alia*, the following articles: "The Little Belt Bridge and international law" (by Dr. Brüel, Denmark); "The question of treaty definition of the term 'aggressor'" (by M. Braatöy, Norway); "The work of the International Law Association in connexion with neutral commerce and navigation and with the Kellogg Pact" (by Dr. Boye, Norway).

There are also digests of judgments rendered by Norwegian and Swedish Courts in matters of private international law.

J. J.

Revue internationale française du droit des gens. Février 1936. Paris.

This is a new French periodical edited by M. Raoul Genet. It contains articles by Dr. Sack, who summarizes Anglo-American doctrine on jurisdiction over crimes committed on board national vessels in foreign ports and waters, by M. Genet, who discusses the place of the League of Nations in the international community and its reconstruction, and by Dr. Korowiez, who discusses the Advisory Opinion of the Permanent Court in the matter of the Danzig Decree-Laws. There are the usual notes and book reviews.

J. M. J.

Journal du droit international (*Clunet*), 1935 (Vol. 62), 1281 pp.

The 1935 volume of *Clunet* begins with an anonymous but competent and timely article on the Mixed Courts in Egypt, followed by an interesting article

by C. L. Boucher on an important question connected with the history of French private international law in the 18th century. Three shorter articles come next: the first of these, by Jean Perroud, deals with the Franco-Swiss treaty of 1869 for the reciprocal enforcement of judgments and the "action directe" against insurers; the second, by J. Maupas, with the Swiss claim brought in 1934 before the Council of the League of Nations against France, Italy, and the United Kingdom, that Swiss nationals should share in the war compensation granted by these countries to their own nationals; and the third, by C. G. Tenekidès, with the divorce of Greek nationals abroad and of foreigners by Greek courts (Greek law, like the laws of many continental countries, attributes jurisdiction to the courts of the residence or domicil while holding that these courts should apply, in deciding the case, the national law of the parties). Professor Arminjon contributes a long study of the 1930 Geneva conventions on Bills of Exchange and Promissory Notes, which shows (*a*) the extreme complexity of the problems of choice of law to which negotiable instruments give rise, (*b*) that the Geneva conventions even if adopted generally would leave many of those problems unsolved. These international conventions may, however, though by a long and rather painful process, eventually lead to a common solution of many problems. Dr. Donker Curtius gives a profound and rather theoretical discussion of gold clauses in bonds issued by the Royal Dutch and other similar large corporations. M. Aghion writes on the recent Franco-Italian Establishment Convention. M.S. van den Kerckhove contributes a plea for international mixed tribunals for private suits between persons of different nationality based on the success of the Mixed Arbitral Tribunals set up under the peace treaties, and Professor Audinet writes an excellent article on the convention signed in 1934 between France and the United Kingdom for the reciprocal enforcement of judgments and on the English Foreign Judgments Act of 1933 and the English common law treatment of foreign judgments (one or two slight misunderstandings of the English Act, for which the difficult language of our Acts of Parliament is ample excuse, hardly diminish the value of the article —for instance, judgments in matrimonial causes and family law are not outside the scope of the Act of 1933 as a whole but only outside the operation of the rules of jurisdiction laid down by the Act). M. Kaonchansky's article on the Development of Matrimonial Law in Soviet Russia gives an explanation of a topic on which enlightenment is particularly needed.

The collection of judgments and notes on judgments, which as usual occupies two-thirds of the volume, is, as always, most useful. On page 1190 will be found a decision of the German Supreme Court which applies the English Statutes of Limitation to a contract governed by English law although in England these provisions have been held to be procedure. The decision is to the same effect as that suggested in the article on Classification in the 1934 number of the *Year Book* (p. 77) but the conclusion is reached not on the grounds recommended by Mr. Beckett but by "Classification on the basis of the *lex fori*". Now that the Russian Banks and other corporations of Imperial Russia are being wound up in England, it is interesting to compare how this question is being dealt with in France (see p. 125 *et seq.* and also p. 164 for the action brought in Germany by an English liquidator of such a company).

Renvoi continues to provoke controversy. On page 99 there is a French decision rejecting it on theoretical grounds, but there are two or three cases

(e.g. p. 613) in the same volume applying it, and a review on p. 225 of a treatise shows that the courts of all countries continue despite the fulminations of the "doctrine" to adopt the renvoi—a result which the author contends must be due to some real merits in the doctrine.

E.

The Journal of Comparative Legislation and International Law, 3rd Series, Vol. XVII.

Of the twenty essays in this year's volume, three are devoted to international law, five to constitutional and administrative law, two are comparative studies in criminal law, and most of the rest are comparative studies in private law. The three essays in international law are "Judicial Precedent in the Making of International Law", by Dr. John C. Gardner, "The Tactic of Progress in International Government", by Professor Pitman B. Potter, and "The International Community", by Mr. Øystein Heggstad. "The Federations and Suits between Governments" was the last essay written by Sir William Harrison Moore; and it bears evidence of the care and wide learning which we expected from that scholar. It is preceded by a sympathetic biographical note. Professor Berriedale Keith's "Notes on Imperial Constitutional Law" are of even more than usual interest, since among other matters they refer to the new Indian Constitution, the first cases under the Statute of Westminster, and some important Irish cases. Dr. Vesey Fitzgerald provides an addendum to his essay of 1934 by surveying Indian and Far Eastern cases on Conflict of Laws reported in 1934. We are promised further articles biennially, and this regular feature will secure a ready welcome. Among the other articles, special mention should be made of the second part of Mr. Wilfred Jenks's article on "The Constitutional Capacity of Canada to give effect to International Law Conventions"—which should be read in conjunction with recent articles by the same author in the *Canadian Bar Review*—Professor Hermann Mannheim's two articles on *Mens Rea* in English and German Law, an article by Dr. Rudolf Gottschalk on "The Law relating to Devaluation of Currency", an essay by Dr. E. Stiefel on "Accident in continental Insurance Law", and Mr. Wortley's review article on "Broadcasting and Comparative Law".

W. I. J.

BIBLIOGRAPHY

(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de la Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., des sci. dip. et pol. = Revue de droit international, des sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; V.u.V. = Völkerbund und Völkerrecht; Z. f. aus. int. Privatrecht = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

Air Law.

Bouve, C. L.: Regulation of international air navigation under the Paris Convention. (Journal of Air Law 6: 299–324.)

Comité international technique d'experts juridiques aériens. (Rev. de dr. aérien 3: 767–95.)

De Visscher, F.: Conflits de lois en matière de droit aérien. (H.R. 48: 285–386.)

Giannini, A.: Il progetto di Berlino sull' assistenza agli aeromobili in pericolo. (Riv. del dir. commerciale 33: 220–36.)

Kaftal, A.: La Convention de Rome du 29 mai 1933 pour l'unification de certaines règles relatives aux dommages causés par les aéronefs aux tiers à la surface et les législations nationales. (Rev. gén. de dr. aérien 3: 689–735; 4: 45–85.)

Korovine, E.: La conquête de la stratosphère et le droit international. (Rev. gén. de dr. int. pub. 41: 675–86.)

Kroell, J.: Les navires porte-aéronefs. (Rev. gén. de dr. aérien 4: 7–18.)

Raafat, W.: La guerre aérienne et le droit des gens. (Rev. de dr. aérien 3: 736–64; 4: 19–44.)

Troisième rapport de M. le Prof. Ambrosini sur l'avant-projet de convention relative à l'abordage aérien. (Riv. di dir. aeronautico, 1935: No. 1, 91–102.)

Unruh, A. v.: Zur Rechtslage der Fluginseln. (V.u.V. I: 538–43.)

Arbitration, Conciliation, and Judicial Settlement.

Arbitration. (International Law Association, 38th Report: 113–26.)

Barcs-Pakrac Railways Co. v. Yugoslavia. Award of the arbitrators appointed by resolution of the Council of the League of Nations of January 17, 1934, rendered at Paris, October 5, 1934. (A.J.I.L. 29: 523–37.)

Cheques.

Arminjon, P.: La convention internationale pour régler certains conflits de lois en matière de lettres de change et de billets à ordre, conclue à Genève le 7 juin 1930. (J.D.I. 62: 521–40; 825–56.)

Balogh, E.: Critical remarks on the law of bills of exchange of the Geneva Convention. (Tulane Law Review 9: 165–90.)

Mossa, L.: Il regresso nel diritto cambiario uniforme. (Rev. del dir. com. 32: 669–94.)

Communications.

Bollecker, L. C.: Radiodiffuser, c'est éditer. (Rev. int. de la radioélectricité 2: 274–86.)

Bruel, E.: Die Brücke über den Kleinen Belt und das Völkerrecht. (Z. f. V. 19: 327–32.)
——: Lillebaeltsbroen og folkeretten. (Nordisk tidsskrift for international ret 6: 129–42.)
Buell, R. L.: The Suez Canal and League Sanctions. (Geneva Research Center.)
Hennig, R.: Unklarheiten im internationalen Donau-Schiffahrtsrecht. (Niemeyers Z. 51: 225–31.)
Homburg, R.: Le Congrès de Bruxelles et la réglementation internationale de la radiodiffusion. (Rev. int. de la radioélectricité 2: 264–73.)
Hoskins, H. L.: The Suez Canal in time of war. (Foreign Affairs 14: 93–101.)
The International Status of the Suez Canal. (Bulletin of International News 12: 3–8.)
La Pradelle, P. de: La réglementation des émissions radioélectriques en temps de guerre. (Rev. int. de la radioélectricité 2: 19–36.)
Raestad, A.: Omkring Suezkanalen. (Nordisk tidsskrift [Stockholm:] II, häft 6, 453–9.)
——: Le projet de convention sur la radiodiffusion et la paix. (Rev. de dr. int. et de lég. comp. 62: 289–98.)
Sandiford, R.: Il canale di Suez e il suo regime internazionale. (Rivista marittima 68: 133–54.)
Soubbotitch, I.: Le nouveau régime juridique du secteur du Danube dit des Cataractes et des Portes-de-Fer. (Annuaire de l'association yougoslave de droit international 2: 77–111.)
Stenuit, R.: Projet de Convention internationale de la radiodiffusion. (Rev. int. de la radioélectricité 2: 137–67.)
Wolff, R.: La protection du droit d'auteur contre les divers modes de communications radiodiffusées. (Rev. int. de la radioélectricité 2: 287–93.)
Wolgast, E.: Die Schliessung des Suez-Kanals und das Wimbledon-Urteil. (V.u.V. 2: 370–8.)

Criminal Law.

Caloyanni: A propos d'une convention pour le jugement et la répression des crimes politiques sur le plan international. (Bulletin de l'Institut catholique de Paris 26: 141–53.)
——: Le terrorisme et la création d'une cour répressive internationale. (R.D.I. 9: 46–71.)
Johnson, W. S.: Extra-territorial criminal legislation. (Canadian Bar Review 13: 127–42.)
Jurisdiction with respect to crime. (A.J.I.L. (Suppl.) 29: 439–645.)
Miele, M.: Natura, fondamento e limiti del diritto internazionale penale. (Nuovi studi di diritto, economia e politica 7: 280–303.)
Preuss, L.: International Law and German legislation on political crime. (Grot. Soc. 20: 85–105)
Racz, G.: Internationales aus dem ungarischen Strafrecht. (Z. f. osteuropäisches Recht I: 365–75.)
Répression internationale du terrorisme—Cour pénale internationale. (Documentation internationale 2: 244–7.)
Rous, A.-A.: Le projet de convention internationale pour la répression des crimes présentant un danger public. (Rev. int. de dr. pénal 12: 99–130.)
Zusammenstellung der Erklärungen ausländischer Regierungen sowie der Verträge und Vereinbarungen mit ausländischen Regierungen über den zwischenstaatlichen Rechtshilfeverkehr in Strafsachen. (Amtliche Sonderveröffentlichungen der Deutschen Justiz Nr. 4: 5–142.)

Extradition.

Bruns, G.: Rechtsprechung in Auslieferungssachen seit Erlass des Auslieferungsgesetzes vom 23. Dezember 1929. (Z. f. aus. öff. R. u. V. 5: 721–33.)
Extradition—Draft convention, with comment, prepared by the research in international law of the Harvard law school. (A.J.I.L. (Suppl.) 29: 1–653.)

METALL, R. A.: L'estradizione e il diritto costituzionale. (Riv. di dir. pubbl. 27: 103–24.)
PHILONENKO, M.: Le refus d'extradition des terroristes croates. (J.D.I. 61: 1157–69.)
RECHID, A.: L'affaire Samuel Insull. (Rev. Gén. 41: 687-710.)

Finance.

CARROLL, M. B.: The development of international tax law—Franco-American treaty on double taxation—Draft convention on allocation of business income. (A.J.I.L. 29: 586–97.)
DAWSON, J. P.: The gold clause decisions. (Michigan Law Review 33: 647–84.)
DOMKE, M.: De l'effet, à l'étranger, de la loi américaine répudiant la clause-or sur les emprunts non américains. (Nouv. rev. de dr. int. privé I: 546–59.)
DONKER CURTIUS, F.: Le caractère international public des réglements financiers internationaux. (Rev. gén. de dr. int. public 42: 105–26.)
——: La clause de paiement en or de la "Royal Dutch". (J.D.I. 62: 541–63.)
ENRIQUES, G.: Universalità e territorialità del fallimento nel diritto internazionale privato (contd.). (Riv. de dir. int. 26: 503–62.)
FENWICK, C. G.: The "gold clause" decision in relation to foreign bondholders. (A.J.I.L. 29: 310–13.)
GUILHOT, J.: La convention franco-américaine du 27 avril 1932 relative à la double imposition. (J.D.I. 62: 325–32.)
JACOT, L.: La faillite en droit international. (Nouv. rev. de dr. int. privé I: 778–95.)
NUSSBAUM, A.: Comparative and international aspects of American gold clause abrogation. (Yale Law Journal 44: 53–89.)
PERCEROU, A.: Les arrêts de la Cour Suprême des États-Unis sur les "clauses-or". (Annales de droit commercial 44: 29–53.)
PIROTTE, S.: Les interprétations diverses de la clause-or. (Bulletin de l'Institut juridique international 32: 207–14.)
Problems of insolvency. (International Law Association, 38th Report: 176–89.)
RAESTAD, A.: Les rapports entre états dans le domaine monétaire. (Acta Scan. 6: 5–36.)
SAUSER-HALL, G.: La répudiation de la clause-or dans les relations internationales. (Revue mensuelle 38: 34–42.)
STALEY, E.: Une critique de la protection diplomatique des placements à l'étranger. (Rev. Gén. 42: 541–58.)
WILDE, C. DE: La faillite internationale. (International Law Association, 38th Report: 270–2.)

Foreigners.

BUNGER: Die Rechtsstellung der Ausländer in China. (Z. f. aus. öff R. u. V. (Berichte und Urkunden) 5: 477–588.)
PREUSS, L.: Position of aliens in National-Socialist penal law reform. (A.J.I.L. 29: 206–18.)
La question des étrangers devant la Chambre. (Cahiers des droits de l'homme 34: 771–5.)

League of Nations.

BURNS, J. J.: Conditions of withdrawal from the League of Nations. (A.J.I.L. 29: 40–50.)
JENKS, C. W.: The relation between membership of the League of Nations and membership of the International Labour Organisation. (B.Y.B. 16: 79–83.)
LE FUR, L.: La Société des Nations et la crise actuelle. (Rev. de dr. int. 8: 305-18.)
MATSUBARA, K.: Conditions and effects of withdrawal from the League of Nations. (J.I.L.D. 34, April, May 1935.) (Japanese text.)
RÜHLAND, C.: Der Beschluss des Völkerbundrates vom 17. April 1935 über die Frage der Rechtmässigkeit des deutschen Wehrgesetzes vom 16. März 1935. (Z. f. V. 19: 131–46.)

SOFRONIE, G.: Égalité ou hiérarchie internationale?—L'évolution et l'aspect juridique du problème sous le régime de la Société des Nations. (Rev. de dr. int., des sci. dip. et pol. 12: 273–86; 13: 1–13.)

Maritime Law.

BATY, T.: Continuous voyage as applied to blockade and contraband. (Grot. Soc. 20: 140–55.)

Claim of the British ship *I'm alone* v. United States. (A.J.I.L. 29: 326–31.)

COUDERT, F.: La liberté des mers. (Esprit international 9: 320–35.)

GIDEL, G.: La mer territoriale et la zone contiguë. (H.R. 48: 137–277.)

GUTTERIDGE, H. C.: The unification of the law of the sea. (J.C.L. 16: 246–51.)

LACHS, F.: Die Meeresfreiheit. (Z. f. öff. Recht 15: 94–119).

STRANDGAARD, K.: International maritime legislation (Acta Scan. 6: 85–95.)

Marriage.

FRANKENSTEIN, E.: La forme du mariage en droit international privé (contd.). (Nouv. rev. de dr. int. privé I: 560–77.)

LISBONNE, J.: Le régime matrimonial des étrangers mariés sans contrat. (J.D.I. 62: 726–34.)

Nationality of married women. (International Law Association, 38th Report: 222–36.)

NIEMEYER, T.: Neuester Stand des positiven internationalen Privatrechts im Gebict der Ehescheidung. (Niemeyers Z. 51: 206–8.)

TENEKIDES, C. G.: Le divorce des Hellènes à l'étranger et des étrangers en Grèce en l'état actuel du droit hellénique. (J.D.I. 62: 305–24.)

Minorities.

OSZVALD, G.: La Haye et les minorités—Le rôle de la Cour permanente de Justice internationale dans la protection des minorités. (Nouv. rev. de Hongrie 53: 276–84.)

Le statut international des minorités doit être appliqué aux Juifs allemands. (Rev. juive de Genève 4: 16–19.)

Nationality.

Das belgische Gesetz vom 30. Juli 1934 betreffend die Anerkennung der Staatsangehörigkeit. (Z. f. aus. öff. R. u. V. 4: 899–903.)

BICKNELL: Nationality of married women. (Grot. Soc. 20: 106–22.)

BORCHARD, E. M.: The citizenship of native-born American women who married foreigners before March 2, 1907, and acquired a foreign domicile. (A.J.I.L. 29: 396–422.)

CHEDIAK, N.: Principios de derecho internacional aplicados por los tribunales cubanos (nacionalidad). (Rev. de der. int. 13: 184–261.)

FLOURNOY, R. W.: Proposed codification of our chaotic nationality laws. (Amer. Bar Assn. Journal 20: 780–3.)

GRIMM: Der belgische Ausbürgerungsprozess. (Deutsche Justiz 97: 1454–60.)

HASSELBLATT, W.: Das belgische Ausbürgerungsverfahren. (Deutsche Justiz 40: 1342–6.)

LAMPIS, G.: Le nuove norme sulla concessione della cittadinanza italiana. (Riv. di dir. pub. 27: 309–13.)

RAESTAD, A.: Statsløse personer og deres rettsstilling. (Nordisk tidsskrift for int. ret 5: 177–90.)

SANDIFER, D. V.: A comparative study of laws relating to nationality at birth and to loss of nationality. (A.J.I.L. 29: 248–79.)

SERENI, A. P.: La cittadinanza degli enti morali nel diritto internazionale (contd.) (Riv. di dir. int. 26: 437–60.)

Permanent Court of International Justice.

AUBURTIN, A.: Die Zuständigkeit des Ständigen Internationalen Gerichtshofs nach dem Leticiaprotokoll vom 24. Mai 1934. (Z. f. aus. öff. R. u. V. 5: 81–7.)

BECKETT, W. E.: Questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale, 1932–4. (H.R. 50: 193–305.)

BORCHARD, E. M.: Declaratory judgements in international law. (A.J.I.L. 29: 488–92.)

EGAWA, H.: The Permanent Court of International Justice and private international law. (J.I.L.D. 34, September 1935.) (Text in Japanese.)

ENGELSDOERFER, A.: La Cour de la Haye en 1932–33 (contd.). (Rev. de dr. int. et de lég. comp. 62: 299–333.)

FRANCOZ, P.: Un "conflit de traités" dans l'affaire des zones franches. (R.D.I. 9: 424–34.)

GODYEVATZ, A.: Compétence de la Cour permanente de Justice Internationale *ratione personae* et *ratione materiae* par rapport au différend concernant les emprunts serbes. (Annuaire de l'Association yougoslave de droit international 2: 208–14.)

HAMMARSKJÖLD, A.: The Permanent Court of International Justice and the development of international law. (International Affairs 14: 797–817.)

HUDSON, M. O.: Two problems of approach to the Permanent Court of International Justice. (A.J.I.L. 29: 636–43.)

——: The United States and the World Court. (A.J.I.L. 29: 301–7.)

LAPIE, O.-O: Une justice à créer: la justice internationale. (Rev. des vivants 9: 671–81.)

LA PRADELLE, A. DE: De l'exécution des décisions de la justice internationale. (Rev. de dr. int. 8: 222–7.)

WILDE, C. DE: La Cour permanente de Justice internationale comme protecteur des droits de personnes privées dont les droits sont lésés par les mesures prises par des États auxquels elles n'appartiennent pas comme citoyens. (International Law Association, 38th Report: 345–69.)

Private International Law.

ALVAREZ, E.: El Código internacional privado (Código Bustamente) y la adhesión de España. (Rev. de der. int. 28: 176–200.)

AUDINET, E.: L'exécution des jugements étrangers en Angleterre d'après la loi du 13 avril 1933 et la convention franco-britannique du 18 janvier 1934. (J.D.I. 62: 806–24.)

BALOGH, E.: L'œuvre juridique de la Société des Nations en droit international privé. (Nouv. rev. de dr. int. privé I: 511–45.)

BARTOS, M.: Le droit international sur la faillite en Yougoslavie. (Annuaire de l'association yougoslave de droit international 2: 241–58.)

BENTWICH, N.: Le développement récent du principe du domicile en droit anglais. (H.R. 49: 377–465.)

BENTZON, V. et HAMMERICH, K.: La récente Union scandinave de droit international privé. (Rev. crit. de dr. int. 20: 855–72.)

Bibliographie générale de droit international privé et de droit pénal international. (Nouv. rev. de dr. int. privé I: 869–89.)

BLAGOYEVITCH, B. T.: Exequatur des jugements étrangers selon la loi yougoslave sur les exécutions et saisies. (Annuaire de l'association yougoslave de droit international 2: 275–89.)

CARABIBER, C.: Chronique de la récente jurisprudence grecque en matière de droit international privé. (Rev. crit. de dr. int. 30: 76–83.)

CHESHIRE, G. C.: Private international law. (L.Q.R. 51: 76–90.)

Conflicts of laws and the validity of contracts. (Iowa Law Review 20: 607–16.)

DUDEN, K.: Internationalprivatrechtliche Rechtsprechung Italiens in den Jahren 1932, 1933, 1934. (Z. f. aus. u. int. Privatrecht 9: 200–37.)

FALCONBRIDGE, J. D.: Situs and transfer of intangibles in the conflict of laws. (Canadian Bar Review 13: 265–78.)

FITZGERALD, S. V.: Indian and Far Eastern cases on the conflict of laws 1934. (J.C.L. 17: 220–6.)

Foreign arbitration awards—Their execution in France—Towards court decisions on new lines? (Foreign Law Series: 29–33, No. 3, 1935.)

GREAVES, V. E.: The judicial status of non-registered foreign corporations in Ecuador. (Tulane Law Review 9: 409–15.)
Die Kollektivabkommen über internationale privatrechtliche Beziehungen. (Z. f. aus. u. int. Privatrecht 9: 249–60.)
KUHN, A. K.: The conflict of laws restatement. (A.J.I.L. 29: 492–5.)
LAPAJNE, M.: Contribution à une Union slave de droit international privé en matière de contrats. (Rev. crit. de dr. int. 29: 873–96.)
LORENZEN, E. G.: A propos du centenaire des commentaires de Story sur les conflits de lois. (Rev. crit. de dr. int. 30: 295–318.)
——: Story's commentaries on the conflict of laws—one hundred years after. (Harvard Law Review 48: 15–38.)
MALMAR, F.: Jugements suédois en matière de droit international privé. (Acta Scan. 6: 41–8.)
MEIJERS, E. M.: L'histoire des principes fondamentaux du droit international privé à partir du Moyen Âge, spécialement dans l'Europe occidentale. (H.R. 59: 547–683.)
MUELLER, R.: Die Geschäftsfähigkeit natürlicher Personen in der internationalprivatrechtlichen Rechtsprechung der Vereinigten Staaten. (Z. f. aus. u. int. Privatrecht 8: 885–96.)
Die nordische Konvention über Erbe, Testament und Nachlassverordnung. (Z. f. aus. u. int. Privatrecht 9: 266–74.)
Permanent courts for international private law. (International Law Association, 38th Report: 71–112.)
RAAPE, L.: Rapports juridiques entre parents et enfants. (H.R. 50: 403–539.)
RABEL, E.: Der Entwurf eines einheitlichen Kaufgesetzes. (Z. f. aus. u. int. Privatrecht 9: 1–79.)
REISS: Die Anerkennung ausländischer Rechtspflegeakte in Danzig. (Danziger Juristen-Zeitung 14: 97–100.)
RICHARDSON, B. V.: Problems in conflict of laws relating to automobiles. (Canadian Bar Review 13: 201–9.)
SALS, I. B.: Sobre la accesión o adhesión de España al Código Americano de derecho internacional privado denominado "Código Bustamente". (Rev. de der. int. 28: 163–75.)
SARTINI-VAN DEN KERCKHOVE, S.: Une juridiction internationale de droit privé. (J.D.I. 62: 775–804.)
SCHELTEMA, E.: L'importance du droit international et du droit comparé pour la pratique du notariat. (Bulletin de l'Institut juridique international 33: 1–14.)
SZASZY, I.: Choice of law by the parties to a contract with principle reference to English and American law. (Grot. Soc. 20: 156–77.)
——: Conflits de lois dans le temps. (Théorie des droits acquis.) (H. R. 47: 149–256.)
——: Das internationalrechtliche Problem der inländischen Anerkennung und Vollstreckbarkeit ausländischer schiedsgerichtlicher Urteile. (Niemeyers Z. 50: 34–59.)
UDINA, M.: La législation et la jurisprudence italiennes en matière de droit international privé de 1930 à 1934. (Rev. crit. de dr. int. 30: 357–79.)
VERNARECCI DI FOSSOMBRONE, C.: Die Vollstreckung der ausländischen Gerichtsurteile in Italien. (Zeitschrift der Akademie für deutsches Recht 2: 27–30.)
WEISS, R.: La sanction juridictionnelle internationale du droit d'auteur. (Rev. de dr. int. et de lég. comp. 62: 334–49.)
YNTEMA, H. E.: Enforcement of foreign judgements in Anglo-American law. (Michigan Law Review 33: 1129–68.)

Public International Law.

Académie diplomatique internationale—Commission de codification du droit international—Projet de rapport d'Alejandro Alvarez. (Rev. Gén. 42: 321–34.)
ACCIOLY, H.: Le Brésil et la doctrine de l'*uti possidetis*. (R.D.I. 9: 36–45.)
AKZIN, B.: On the teaching of international law. (Iowa Law Review 20: 774–84.)
ALOISI, U.: Protezione internazionale delle cose di pregio storico o artistico. (Giustizia penale (pt. 3) 41: 577–600.)

ALVAREZ, A.: Académie diplomatique internationale—Les grands principes du droit international. (R.D.I. 9: 521–39.)
ARMOUR, W. S.: Obstacles of national and primitive customs to the spread of international law. (Grot. Soc. 20: 1–10.)
BALLADORE-PALLIERI, G.: Le dottrine di Hans Kelsen e il problema dei rapporti fra diritto interno e diritto internazionale. (Riv. di dir. int. 27: 24–82.)
BATY, T.: The threatened chaos in the law of nations. (Contemporary Review 148: 65–70.) International law association and Institut de droit international proposed changes in international law.
BOHMERT: Die "GEMEINSCHAFTEN" der Balkanvölker und das Völkerrecht. (Z. f. V. 19: 265–326.)
BORCHARD, E. M.: Declaratory judgements in international law. (A.J.I.L. 29: 488–92.)
BOURQUIN, M.: Le problème de la sécurité internationale. (H.R. 49: 473–541.)
BRIERLY, J. L.: International law in England. (L.Q.R. 51: 24–35.)
BROWN, P. M.: Codification of international law. (A.J.I.L. 29: 24–39.)
BRUNS, V.: Mineitciro Adatci. (Z. f. aus. öff. R. u. V. 5: 1–4.)
BUSTAMENTE Y SIRVEN, A. S.: Las servidumbres internacionales. (Rev. de der. int. 14: 70–93.)
CASTBERG, F.: Britisch-norwegische Divergenzen über die Ausdehnung des norwegischen Küstenmeeres. (V. u. V. 2: 441–6.)
CLARK, G. N.: Grotius's East India mission to England. (Grot. Soc. 20: 45–84.)
Conférence sur la méthode et l'organisation de l'enseignement du droit des gens et des relations internationales tenue à Lwów les 26–28 juin 1934. (Niemeyers Z. 50: 439–42.)
COSENTINI, F.: Código internacional de la paz y de la guerra. (Rev. de der. int. 14: 207–66.)
——: Código internacional de la paz y de la guerra (contd.). (Rev. de der. int. 28: 5–162.)
——: Principes généraux du droit des gens et les droits fondamentaux des États. (Rev. de dr. int., des sci. dip. et pol. 13: 102–19.)
DE VISSCHER, C.: La protection diplomatique des actionnaires d'une société contre l'État sous la législation duquel cette société s'est constituée. (Rev. de dr. int. et de lég. comp. 61; 624–51.)
——: La protection internationale des objets d'art et des monuments historiques. (Rev. de dr. int. et de lég. comp. 61: 32–74; 62: 246–88.)
EFREMOFF, J.: Projet de pacte régional de non-agression, d'assistance mutuelle et de conciliation. (Rev. de dr. int. et de lég. comp. 61: 712–42.)
FAIRMAN, C.: A note on re piracy jure gentium. (A.J.I.L. 29: 508–12.)
FLEURIAU, A. DE.: Les méthodes de la diplomatie moderne. (Revue de l'Université de Bruxelles 40: 378–90.)
FRIED, W.: Das Estoppel-Prinzip im Völkerrecht. (Z. f. aus. öff. R. u. V. 5: 517–45.)
GARDNER, J. C.: Judicial precedent in the making of international public law. (J.C.L. 17: 251–9.)
GARDOT, A.: Jean Bodin. (H.R. 50: 549–743.)
GARNER, J. W.: The doctrine of the Thalweg as a rule of international law. (A.J.I.L. 29: 309–10.)
GJELSVIK, N.: Über dolus bonus und dolus malus im Völkerrecht. (Z. f. V. 19: 175–216.)
HABICHT, M.: Le pouvoir du juge de statuer "ex aequo et bono". (H.R. 49: 281–369.)
HAMMARSKJÖLD, A.: Les immunités des personnes "investies de fonctions d'intérêt international". (Rev. de dr. int. et de lég. comp. 62: 5–31.)
——. Quelques aspects de la question des mesures conservatoires en droit international positif. (Z. f. aus. öff. R. u. V. 5: 5–33.)
HANSSON, M.: Les tribunaux mixtes en Égypte. (Acta Scan. 5: 104–22.)
HERTZ, W. G.: Die Menschenrechte. (Friedens-Warte 34: 225–32.)
HERZ, H.: Beiträge zum Problem der Identität des Staates. (Z. f. öff. Recht. 15: 241–68.)
HEYDTE, F. A. F. VON DER: Discovery, symbolic annexation and virtual effectiveness in international law. (A.J.I.L. 29: 448–71.)

Hoor, E.: Das Völkerrecht bei Kant, Fichte und Hegel. (Acta Scan. 5: 81–103.)
Hyde, C. C.: The arms traffic from the standpoint of international law. (Proceedings of the Acad. of Pol. Sc. 16: 3–11.)
Institut de droit international, session de Paris, octobre 1934. (Rev. de dr. int. et de lég. comp. 61: 734–52. Texte des résolutions votées annexé.)
La Pradelle, A. de: La session de Budapest de l'International Law Association. (Nouv. rev. de Hongrie 28: 43–51.)
Lauterpacht, H.: The Pact of Paris and the Budapest articles of interpretation. (Grot. Soc. 20: 178–206.)
Lee, R. W.: Family life of Grotius. (Grot. Soc. 20: 11–24.)
Legaz y Lacambra, L.: Les garanties constitutionelles du droit international. (R.D.I. 9: 72–89.)
Leontiades, L.: Der griechisch-türkische Bevölkerungsaustausch. (Z. f. aus. öff. R. u. V. 5: 546–76.)
Makarov, A. N.: Sowjet-Union und Völkerbund. (Z. f. aus. öff. R. u. V. 5: 34–60.)
Menzel, E.: Der Wirkungsgrad der Völkerrechtsnormen im englischen Recht. (Z. f. V. 18: 155–80.)
Monaco, R.: L'oggetto del trasferimento nelle mutazioni territoriali fra Stati (contd.). (Riv. di dir. int. 26: 461–502.)
Nagler: Die Beleidigung fremder Staatsoberhäupter. (V. u. V. 2: 170–76.)
Paez, F. R.: El estado frente al derecho internacional. (Anales de la universidad central (Quito) 44: 11–81.)
Piola Caselli, E.: Le nuove convenzioni di Londra 2 giuguo 1934 per la protezione della proprietà industriale. (Riv. del dir. com. 32: 645–68.)
Potter, P. B.: The classification of international organisations. (Amer. Pol. Sc. Rev. 29: 212–24; 403–17.)
——: The tactic of progress in international government. (J.C.L. 17: 260–8.)
Praag, L. van: La question de l'immunité de juridiction des États étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent. (Rev. de dr. int. et de lég. comp. 61: 652–82; 62: 100–37.)
Prager, A.: Eigentum und Staatsgebiet. (Z. f. öff. R. 14: 611–33.)
Preuss, L.: Kidnapping of fugitives from justice on foreign territory. The Jakob case. (A.J.I.L. 20: 502–7.)
——: National socialist conceptions of international law. (American Pol. Sc. Rev. 29: 594–609.)
Projet de Convention internationale pour le rapatriement des objets d'intérêt paléontologique, archéologique, historique ou artistique, perdus ou volés ou ayant donné lieu à une aliénation ou exportation illicite. (Coopération intellectuelle: 87–91, janvier–février, 1935.)
Ray, J.: Des conflits entre principes abstraits et stipulations conventionnelles. (H.R. 48: 635–707.)
Reale, E.: Le problème des passeports. (H.R. 50: 89–187.)
Rousseau, C.: Jurisprudence française en matière de droit international public. (Rev. Gén. 42: 203–30.)
Salaya, C.: Las comisiones de investigación organizadas por la convención Gondra no deben actuar en los casos de reclamaciones internacionales de carácter pecuniario hechas por denegación de justicia. (Rev. de der. Int. 14: 174–88.)
Scelle, G.: Le concept de société internationale—ses conséquences en technique juridique. (Rev. de dr. int. 9: 7–35.)
——: Théorie juridique du plébiscite en fonction du droit des peuples à disposer d'eux-mêmes. (Bulletin interparlementaire 15: 1–18.)
Schiffer, W.: Über den Begriff der politischen Streitigkeiten im Völkerrecht. (Z. f. öff. R. 14: 594–610.)
Schlechtriem, W.: Gegenstand und Aufgabe des Urheberschutzes im Zeitwandel. (Geistiges Eigentum I: 15–26.)
Secretan, J.: The independence granted to agents of the international community in their relations with national public authorities. (B.Y.B. 16: 56–78.)
Shibayev, V. A.: The Roerich pact for protection of cultural treasures. (Twentieth Century 1: 666–72.)

Simons, H.: Some European aspects of international law. (Social Research 2: 461–80.)
Stoker, W. H.: Some juridical aspects of sovereignty. (Nineteenth Century 118: 142–50.)
Straub, P.: Die Rechte des Gesandten auf Reisen vor der Begläubigung und nach der Abberufung. (Niemeyers Z. 51: 1–94.)
Strupp, K.: Règles générales du droit de la paix. (H.R. 47: 263–593.)
Stuart, G.: Le droit et la pratique diplomatiques et consulaires. (H.R. 48: 463–569.)
Tenekides, G. C.: Rapports de droit interne et de droit international en matière de chose jugée. (Rev. de dr. int. et de lég. comp. 61: 638–711.)
Török, A.: Nationalstaatsidee und Völkerrechtsordnung. (Z. f. V. 18: 249–94.)
Trade marks. (International Law Association, 38th Report: 127–75.)
Travaux de la Commission de codification des grands principes de droit international. (Acad. dip. int., Séances et travaux 9: 13–48.)
Veiga-Simoes, A. da: Crise et intervention. (H.R. 50: 753–839.)
Verzjil, J.: La validité et la nullité des actes juridiques internationaux. (Rev. de dr. int. 9: 284–339.)
Voncken, J.: La XVe Conférence internationale de la Croix-Rouge (Tokio, octobre 1934). (Rev. gén. de dr. aérien 4: 86–94.)
Watrin, G.: Le juridique et le politique dans l'organisation de la justice internationale. (Rev. de dr. int. 8: 167–96.)
Wehberg, H.: La police internationale. (H.R. 48: 7–131.)
Wiltse, C. M.: Thomas Jefferson on the Law of Nations. (A.J.I.L. 29: 66–81.)
Wolgast, E.: Pressbeleidigungen ausländischer Staatshäupter. (V.u.V. I: 490–563.)
Wright, Q.: The conception of aggression in international law. (A.J.I.L. 29: 373–95.)
Yepes, J. M.: Problèmes fondamentaux du droit des gens en Amérique. (H.R. 47: 3–141.)
Zimmern, A. E.: International law and social consciousness. (Grot. Soc. 20: 25–44.)

Recognition.

Erich, R.: Några antekningar rörande det folkrättsliga erkännandet särskilt med avseende a verkningarna av upptagande såsom medlem av Nationernas Förbund. (Nordisk tidsskrift for int. ret 6: 33–9.)
Heuss, A.: Zum Problem juristischer Unterscheidung völkerrechtlicher Anerkennungsarten. (Z. f. V. 19: 1–38.)
Raestad, A.: Internasjonal anerkjennelse av nye stater og regjeringer. (Nordisk tidsskrift for int. ret 6: 95–128.)
Yokota, K.: The recent development of the Stimson doctrine. (Pacific Affairs 8: 133–43.)

Treaties.

Anderson, C. P.: Treaties as domestic law. (A.J.I.L. 29: 472–6.)
Bayon y Chacon, G.: Révision des traités devenus inapplicables et des situations juridiques, mettant en danger le maintien de la paix. (Rev. de dr. int. 8: 44–57.)
Bentzon, V.: Fem Nordiske Rets-Konventioner. (Tiddskrift for Rettsvidenskap 13: 336–83.)
Cavaglieri, A.: La violenza come motivo di nullità dei trattati. (Riv. di dir. int. 27: 4–23.)
Constantinoff, J.: Le traité et la loi dans leurs rapports réciproques. (Nouv. rev. de dr. int. privé I: 703–38.)
Elbe, J. von: Einige Fälle von Vertragsrevision im XIX. Jahrhundert. (Z. f. aus. öff. R. u. V. (Abhandlungen) 5: 269–92.)
Fairman, C.: Implied resolutive conditions in treaties. (A.J.I.L. 29: 219–36.)
——: Interpretation of treaties. (Grot. Soc. 20: 123–39.)
Garner, J. W.: Acts and joint resolutions of Congress as substitutes for treaties. (A.J.I.L. 29: 482–8.)

GARNER, J. W., and JOBST, V.: The unilateral denunciation of treaties by one party because of alleged non-performance by another party or parties. (A.J.I.L. 29: 569–85.)

JENKS, C. W.: The constitutional capacity of Canada to give effect to international labour conventions. (J.C.L. 16: 201–15; 17: 12–30.)

——: Some characteristics of international labour conventions. (Canadian Bar Review 13: 448–62.)

JONES, J. M.: The retroactive effect of the ratification of treaties. (A.J.I.L. 29: 51–65.)

KRAUS, H.: Système et fonctions des traités internationaux. (H.R. 50: 317–99.)

LAUTERPACHT, H.: Some observations on preparatory work in the interpretation of treaties. (Harvard Law Review 48: 549–91.)

——: Travaux préparatoires et interprétation des traités. (H.R. 48: 713–819.)

Law of treaties—Draft convention, with comment, prepared by the Research of international law of the Harvard Law School. (A.J.I.L. (Supp.) 29: 657–1226.)

NIBOYET, J. P.: Le problème des "qualifications" sur le terrain des traités diplomatiques. (Rev. crit. de dr. int. 30: 1–34.)

SIOTTO-PINTOR, M.: Traités internationaux et droit interne. (Rev. gén. 42: 521–40.)

VALLINDAS, P.: Die vorläufige Inkraftsetzung völkerrechtlicher Verträge in Griechenland. (Z. f. aus. öff. R. u. V. (Berichte und Urkunden) 5: 210–14.)

VAN ZANTEN, H.: Een laeune in het volkenrecht. (Haagsch maandblad 12: 1–18.)

VERDROSS, A.: Anfechtbare und nichtige Staatsverträge. (Z. f. öff. Recht 15: 290–9.)

WHITTON, J. B.: La règle "Pacta sunt servanda". (H.R. 49: 151–275.)

——: The sanctity of treaties (pacta sunt servanda). (International Conciliation 1935: 395–427.)

WILSON, G. G.: Treaties and changing conditions. (A.J.I.L. 29: 307–8.)

ZANCLA, P.: Sulla revisione dei trattati mediante dichiarazione degli interessi collettivi. (Rev. dc dr. int., des sci. dip. et pol. 13: 13–25.)

War and Neutrality.

ALESSANDRI: La guerre et son droit (contd.). (Rev. gén. du dr. de la lég. et de la jurisprudence 59: 207–21.)

BROUCKÈRE, L. DE: La prévention de la guerre. (H.R. 50: 5–83.)

COUDERT, F. R.: Is neutrality consistent with international cooperation? (Proceedings of the Acad. of Pol. Sc. 16: 39–50.)

CYBICHOWSKI, S.: Das völkerrechtliche Okkupationsrecht. (Z. f. V. 18: 295–322.)

GIRAUD, E.: Théorie de la légitime défense. (H.R. 49: 691–865.)

HERTZ, W. G.: Das Problem des völkerrechtlichen Angriffs. (Z. f. öff. Recht 15: 300–29.)

JESSUP, P. C.: The new neutrality legislation (A.J.I.L. 29: 665–70.)

KULSRUD, C. J.: Armed neutralities to 1780. (A.J.I.L. 29: 423–47.)

LA PRADELLE, A. DE: L'évolution de la neutralité. (Rev. de dr. int. 8: 197–221.)

MAUPAS, J.: L'attribution de dommages de guerre par la France aux ressortissants suisses. (J.D.I. 62: 277–304.)

NOVA, R. DE: La neutralità nel sistema della Società delle Nazioni e del Patto Kellogg (contd.). (Annali di scienze politiche 8: 57–109; 167–225.)

RAPISARDI-MIRABELLI, A.: Appunti sulla illiceità del bombardamento aereo senza distinzione. (Riv. di dir. aeronautico 1935: 8–13.)

RIESCH, E.: Die Verwendung der Ultragiftwaffe durch Luftstreitkräfte im Lichte des Völkerrechts. (Niemeyers Z. 50: 15–33.)

SCOTT, J. B.: The neutrality of the good neighbor. (International Conciliation 1935: 358–70.)

——: Neutrality of the United States. (A.J.I.L. 29: 644–52.)

SPENCER, J. H.: Die Vereinigten Staaten und die Rechte der Neutralen im Seekriege. (Z. f. aus. öff. R. u. V. (Abhandlungen) 5: 293–309.)

STIMSON, H. L.: Neutrality and war prevention. (International Conciliation 1935: 347–57.)

WAFFENFELDT, V.: La importancia de estados neutrales en la moderna conducción de guerra terrestre. (Revista militar (Buenos Aires) 35: 571–84.)

WARREN, C.: Belligerent aircraft, neutral trade and unpreparedness. (A.J.I.L. 29: 197–205.)

INDEX

Date Due